TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 38

UNITED STATES OF AMERICA, PETITIONER,

vs.

PETER BROWN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 24, 1954

CERTIORARI GRANTED APRIL 26, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 654

UNITED STATES OF AMERICA, PETITIONER,

vs.

PETER BROWN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

1 In United States Court of Appeals for the Second Circuit

PETER BROWN, PLAINTIFF-APPELLANT

against

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

STATEMENT UNDER RULE 15(B)

On April 9, 1952, the summons and complaint were served. Answer was served on the 26th day of September, 1952.

This appeal is taken from an order and judgment made by E. J. Dimock, U. S. D. J., dismissing the complaint herein.

The plaintiff's notice of appeal was filed on the 6th day of July, 1953.

No property was attached; no questions were referred to a commissioner, master or referee.

2 Summons. (Omitted in printing.)

[Title omitted]

3 In United States District Court

COMPLAINT

Plaintiff, by Harry E. Kreindler, his attorney, for his complaint against the defendant, respectfully shows to this Court and alleges:

FIRST: Plaintiff at all times hereinafter mentioned was and now is a citizen of the United States, resident and domiciled in the State of New York, City and County of New York.

SECOND: That this Court has jurisdiction by reason of Section 1346 of Title 28 of the United States Code and chapter 171 of Title 28 of the United States Code, known as the Federal Tort Claims Act.

THIRD: The claim for relief is in an amount in excess of $3,000.

FOURTH: That defendant, the United States of America, through its employees and through the Veterans' Administration, a Federal agency, at all times hereinafter mentioned, did, and now does, operate a hospital at 130 West Kingsbridge Road, the Bronx, New York.

FIFTH: That the plaintiff was duly admitted into said hospital on October 1, 1951, for the purpose of having an operation performed upon his left knee.

SIXTH: That on October 4, 1951, plaintiff's left knee was operated upon by the defendant, the United States of America, through its employees.

SEVENTH: That the defendant, the United States of America, through its employees, in a grossly negligent and careless
4 manner, permitted a defective tourniquet to be applied to the plaintiff's left leg during said operation.

EIGHTH: That the defendant, the United States of America, through its employees, in a grossly negligent and careless manner applied said tourniquet to the plaintiff's left leg; that the defendant, the United States of America, through its employees, in a grossly careless and negligent manner, did not promptly remove said tourniquet from the plaintiff's leg, but negligently and carelessly continued to increase the pressure therein.

NINTH: That at all times during said operation, plaintiff was under the complete control of the defendant; that he was under the influence of a spinal anesthetic, and that he was not able to see or feel the application of said tourniquet.

TENTH: That as a result of the said negligent and careless acts and without any contributory negligence on the part of the plaintiff, the plaintiff was severely injured. He was confined to said hospital for approximately sixteen (16) weeks, and was thereafter, and is now, required to report to said hospital each day for treatment. Plaintiff has lost all sensitivity in portions of his left leg below the knee and has lost control of certain of the muscles in that portion of his leg, and is unable to walk without the aid of orthopedic braces. Plaintiff has suffered and will continue to suffer great physical and mental pain and anguish and has lost much time from his employment with consequent loss of earnings and his earning capacity has been permanently impaired.

ELEVENTH: That by reason of the premises, plaintiff has been damaged in the sum of $100,000.

5 TWELFTH: Plaintiff has at all times born true allegiance to the Government of the United States of America and has not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of $100,000, besides the costs and disbursements of this action.

HARRY E. KREINDLER,
Attorney for Plaintiff,
Office & P. O. Address,
51 Chambers Street,
Borough of Manhattan,
City of New York (7).

6 In United States District Court

The defendant, United States of America, by its attorney, Myles J. Lane, United States Attorney for the Southern District of New York, for its answer to the complaint herein alleges as follows:

1. Denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "First," "Second," "Third," "Fourth," "Fifth," "Sixth," "Ninth," and "Twelfth."

2. Denies the allegations contained in paragraphs "Seventh," "Eighth," "Tenth" and "Eleventh."

WHEREFORE, the defendant, United States of America, demands judgment against the plaintiff, dismissing the complaint herein, together with the costs and disbursements of this action.

Dated: New York, N. Y.

MYLES J. LANE,
United States Attorney for the
Southern District of New York,
Attorney for Defendant.

By: JOHN M. FOLEY,
Assistant United States Attorney,
Office and Post Office Address:
United States Court House,
Foley Square,
Borough of Manhattan,
City of New York.

7 IN THE UNITED STATES DISTRICT COURT

INTERROGATORIES—March 5, 1953

The defendant requests that the plaintiff, Peter Brown, answer under oath in accordance with Rule 33 of the Federal Rules of Civil Procedure the following interrogatories:

1. State whether or not plaintiff is a veteran.

2. If the answer to Interrogatory No. 1 is in the affirmative, state the date and the nature of plaintiff's discharge.

3. If the answer to Interrogatory No. 1 is in the affirmative, identify the branch and organization in which plaintiff saw service and state the period or periods of plaintiff's service.

4. If the answer to Interrogatory No. 1 is in the affirmative, state whether plaintiff was ever injured or wounded while a member of the Armed Forces.

5. State whether or not plaintiff was admitted to the Veterans Administration Hospital at No. 130 Kingsbridge Road, Bronx, New York, as a result of his veteran's status.

6. State whether or not plaintiff at the time of his admission in said hospital suffered from any service-connected disability or disabilities. If the answer to this interrogatory is in the affirmative, specify the nature of such disability or disabilities.

8 7. State whether plaintiff received at any time a pension from the defendant or one of its agencies. If the answer to this interrogatory is in the affirmative, state how and under what circumstances such pension was awarded, the amount of said pension and the awarding agency.

New York, N. Y.

MYLES J. LANE,
United States Attorney for the Southern District of New York, Attorney for United States of America,

by JOHN M. FOLEY,
Assistant United States Attorney,
Office and P. O. Address:
United States Courthouse,
Foley Square, Borough of Manhattan,
City of New York, N. Y.

9 IN UNITED STATES DISTRICT COURT

ANSWER TO INTERROGATORIES

Answering interrogatories dated March 5, 1953:

1. Yes. Plaintiff is a veteran.
2. Plaintiff was discharged on August 6, 1944. C. D. D. Section 2.
3. The plaintiff saw service in the Army Air Force from October 27, 1942 to August 6, 1944. He does not have the record of all organizations in which he served within the Air Force, but he does remember serving in the 60th Air Depot Group and the 487th Bombadier Training Squadron among others. He was discharged from the Air Force unassigned.
4. Yes.
5. Yes.
6. Yes.
7. Recurrent dislocation of the patella.
8. Yes. Pension was awarded by the Veterans Administration upon application of the plaintiff at the time of discharge. The original pension was for 30% disability.

It has varied since then from 10% to 100%.

(Sworn to by Peter Brown, March 13, 1953.)

10 IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION—March 24, 1953

SIRS:

PLEASE TAKE NOTICE that the defendant, United States of America, will move before a motion part of this Court to be held on April 2, 1953, in Room 506, United States Court House, Foley Square, New York, at 10:00 A. M., or as soon thereafter as counsel can be heard for a summary judgment dismissing the complaint herein or in the alternative, for an order dismissing the complaint for failing to state a claim within the jurisdiction of this Court or in the alternative, for an order dismissing the complaint for failure to state a claim upon which relief can be granted together with such other and further relief as to the Court may seem just and proper.

New York, N. Y.

Yours, etc.

MYLES J. LANE,
United States Attorney for the Southern District of New York, Attorney for United States of America.
Office & Post Office Address:
United States Court House,
Foley Square,
New York 7, N. Y.

TO:

HARRY E. KREINDLER, ESQ.,
Attorney for the Plaintiff,
51 Chambers Street,
New York, N. Y.

11 IN THE UNITED STATES DISTRICT COURT

AFFIDAVIT OF JOHN M. FOLEY, READ IN SUPPORT OF MOTION

State of New York:
County of New York, ss:
Southern District of New York,

JOHN M. FOLEY, being duly sworn, deposes and says:

I am an Assistant United States Attorney for the Southern District of New York. I am in charge of the above matter and am fully familiar with all the facts and circumstances therein.

This affidavt is submitted in support of an application for an order granting a summary judgment in favor of the defendant pursuant to Rule 56 of the Federal Rules of Civil Procedure or in the

alternative for an order dismissing the complaint pursuant to Rule 12 of the Federal Rules of Civil Procedure.

This is an action instituted under the provisions of the Federal Tort Claims Act by a veteran to recover damages for personal injuries allegedly sustained by him while a patient at the Veterans Administration Hospital at 130 West Kingsbridge Road, Bronx, New York. The plaintiff, in answer to interrogatories propounded to him by the defendant has stated that he was admitted to this hospital as a result of his veteran status and at the time of admission he was suffering from a service-connected disability.

In *O'Neill v. United States*, decided February 19, 1953, the Court of Appeals for the Ninth Circuit granted the Government's motion for summary judgment. This case is identical factually with the instant suit.

12 A copy of the *O'Neill* opinion is annexed to this affidavit. No purpose will be served by paraphrasing the holding or legal reasoning contained therein. It is sufficient to note that the Court held that the Government is not liable under the Federal Tort Claims Act for injuries sustained by a discharged serviceman, and that his proper avenue for relief is in the compensation statutes, Section 31, Public Law 141, 73rd Congress, 38 U. S. C. 501(a).

WHEREFORE, it is respectfully prayed that a summary judgment be entered dismissing the complaint as only an issue of law is to be resolved, or, in the alternative, an order be entered dismissing the complaint under provisions of Rule 12 of the Federal Rules of Civil Procedure.

(Sworn to by John M. Foley, March 24, 1953.)

13 IN THE UNITED STATES DISTRICT COURT

AFFIDAVIT OF LEE S. KREINDLER, READ IN OPPOSITION TO MOTION

State of New York,
County of New York, ss:

LEE S. KREINDLER, being duly sworn, deposes and says:

That he is associated with Harry E. Kreindler, Esq., attorney for the plaintiff. That he has possession of the file and is familiar with the contents thereof.

That this affidavit is submitted in opposition to the defendant's motion for summary judgment dismissing the complaint herein, or in the alternative for an order dismissing the complaint for failing to state a claim within the jurisdiction of this Court, or in the alternative for an order dismissing the complaint for failure to state a claim upon which relief can be granted.

That this is an action brought to recover for serious personal injuries sustained by the plaintiff when he was a patient at the Vet-

erans Administration Hospital, at No. 130 Kingsbridge Road, Bronx, New York, on October 4, 1951.

That the plaintiff served in the Army Air Force from October 27, 1942, to August 6, 1944. He was honorably discharged on August 6, 1944, with a service-connected disability (C. D. D. Section 2). The plaintiff had been injured in the left knee during military operations in New Guinea. Following his injury he was hospitalized until August, 1944. He was able to walk, but upon any sudden or strenuous movements, his left leg would become dislocated. On March 8, 1950, he was operated upon by the Veterans Administration, for the purpose of "cleaning up" the knee joint. His leg continued
14 to dislocate frequently, however.

Pursuant to his status as a veteran, the plaintiff was admitted to the Veterans Administration Hospital, at 130 Kingsbridge Road, Bronx, New York, on October 1, 1951, for examination and possible treatment. It was decided at that time that another operation should be performed on his left knee for the purpose of preventing the leg from dislocating. The operation was performed on October 4, 1951. It was to be a so-called bloodless operation, requiring the application of a tourniquet on the left thigh. The tourniquet was applied by an operating room attendant in the employ of the Veterans Administration. The tourniquet was defective in that the pressure gauge was not registering and an excessive amount of pressure was applied to plaintiff's leg. The attendant should have realized that the tourniquet was defective as soon as it was applied, but he did not. As a result of the excessive pressure having been applied by the tourniquet, the nerves in the plaintiff's leg were seriously and permanently injured. The plaintiff was confined to the hospital for approximately sixteen weeks thereafter, and for a long period after that was required to report to the hospital each day for treatment. He lost all sensitivity in portions of his left leg below the knee, and has lost control of some of the muscles in that portion of the leg. He is unable to walk without an orthopedic brace and at this time it appears that he will never regain the full use of his leg.

The negligence alleged on the part of the defendant consists of the application of the defective tourniquet by employees of the defendant, and their failure to recognize the defective and dangerous condition of the tourniquet.

15 The plaintiff brought this action under the Federal Tort Claims Act, 28 USCA 1346, 2671, *et seq.* A summons and complaint was served upon the defendant on April 14, 1952, and after numerous extensions of time to answer, the defendant's answer was received by the plaintiff on September 26, 1952. The answer consisted of general denial.

The defendant has now moved to dismiss the complaint on the ground that the government is not liable under the Federal Tort Claims Act for injuries sustained by a discharged serviceman while

in a Veterans Administration hospital, and that the plaintiff's exclusive remedy is in the compensation statutes, 38 USCA 501A.

There is no question that the plaintiff received a pension from the government upon his discharge, nor does the plaintiff deny that this pension has been increased as a result of the injury he sustained in the Veterans Administration Hospital in 1951. We vigorously contest, however, the defendant's allegation that an award under the compensation statutes constitutes a bar to the bringing of an action under the Tort Claims Act.

The injury sustained at the hands of the government's employees in October, 1951 was a new and different injury from the recurrent dislocation of the patella that the plaintiff had when he entered the Veterans Administration Hospital.

The Federal Tort Claims Act, under which the plaintiff is proceeding, was passed by Congress in 1946, long after the compensation statutes became effective. The Act permits actions to be started against the government for the negligence of governmental employees. Its language is general in scope. It provides (28 U. S. C. A. 2680) for twelve specific exceptions. The plaintiff's action herein does not fall within any one of these exceptions or a combination of any of them, nor is there anything in the Compensa-
16 tion Act (38 U. S. C. A. 501A) providing that that Act is the exclusive remedy for a veteran.

Thus, the government is arguing that new and different exceptions be read into the Tort Claims Act. The government overlooks the fact that the Tort Claims Act was passed in 1946, when Congress was unquestionably cognizant of the rights and remedies of veterans. *Brooks v. United States* (1949), 337 U. S. 49, 69 S. Ct. 918. The government also overlooks the fact that eighteen Tort Claims bills were introduced in Congress between 1925 and 1935. All but two of them contained exceptions denying recovery to members of the armed forces. When the present Tort Claims Act was introduced the exception concerning servicemen had been dropped. It was this Act, passed without any exclusion, that was passed in 1946, and is the present law. *Brooks v. United States, supra.*

Rather than argue the law in his affidavit, the Assistant United States Attorney has cited the recent case of *O'Neill v. United States*, decided 2/19/53 by the Court of Appeals for the District of Columbia Circuit. I have read this case carefully and examined the authorities cited therein. I have found this decision to be squarely in conflict with the decision of the Court of Appeals for the First Circuit in *Santana v. United States* (1949), 175 Fed. 2d 320, and the decision in *Bandy* v. *United States* (D. C. Nevada 1950), 92 Fed. Sup. 260. In my opinion, the *O'Neill* case is in conflict with the Supreme Court decisions in *Brooks v. United States* (1949), 337 U. S. 49, 69 S. Ct. 918, and *Feres* v. *United States* (1950), 340 U. S. 135, 71 S. Ct. 153.

Santana v. United States (1st Circuit 1949), 175 Fed. 2d 320, is a case squarely in point. This also was an action under the Federal Tort Claims Act. The plaintiffs were the heirs of Manuel Rey, a veteran who obtained admission to a Veterans Administration Hospital subsequent to his discharge. The complaint alleged
17 that he died as the result of the negligence of the employees of the hospital in caring for him.

The United States made the same arguments in that case as it does in the case at bar. It argued that there was a comprehensive system of special statutory benefit for service-connected injuries; that Congress in enacting the Tort Claims Act must have intended to exclude such claims from it; that despite the general language of the act and the fact that the act itself contains twelve specific exceptions, none of which excludes an ex-serviceman from its benefits, it should be read as impliedly excluding such claims.

The District Court dismissed the complaint, but the Court of Appeals reversed. The Court of Appeals said, at page 322:

> "In our opinion, the decision in the *Brooks* case has completely undermined the arguments of the government in the case at bar * * *
>
> "In the case at bar Manuel Rey was not in the service at the time of the negligence complained of. He had returned to private life as a discharged veteran and inclusion of his claim within the coverage of the Tort Claims Act would involve no problem of the 'subversion of military discipline.'
>
> "With respect to the remaining argument that Congress presumably did not intend to include discharged veterans within the coverage of the Tort Claims Act insofar as they already are covered by a 'comprehensive system of special statutory benefits,' the Supreme Court in its decision in the *Brooks* case, in the language above quoted expressly discredited that argument even as applied to servicemen."

18 The Court in the *O'Neill* case, *supra*, at page 4 of its opinion, passed off the *Santana* case by simply saying that it "was decided before the *Feres* case."

The *Feres* case, however, in no way overrules or distinguishes the *Santana* case, and, in fact is inapplicable t the case at bar. The *Feres* case (*Feres v. United States* [1950], 340 U. S. 135, 71 S. Ct. 153), actually involved three cases.

In the *Feres* case itself, the first of the three cases, the decedent perished by fire in a barracks while he was on active duty in the service of the United States.

In *Jefferson v. United States*, the second of the three cases, the plaintiff, while on active duty in the army was required to undergo an operation. Eight months later, after his discharge, a towel marked

"U. S. Army" was discovered and removed from his stomach. The complaint therein alleged that the towel was negligently left there by the original army surgeon.

In *Griggs v. United States*, the third of the three cases considered, the complaint alleged that the deceased met his death while on active duty because of the negligent medical treatment rendered to him by army surgeons.

It is thus apparent that all three cases concerned negligence of army personnel which cause injury to servicemen while on active duty. The Court said, at page 138:

> "The common fact underlying the three cases is that each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces * * *
>
> "This is the 'wholly different case' reserved from our decision in *Brooks v. United States*, 337 U. S. 49, 52, 69 S. Ct. 918, 920, 93 L. Ed. 1200."

In its opinion, the Court repeatedly refers to and limits its decision to servicemen on active duty, or "in service." Referring
19 again to the *Brooks* case, the Court said, at page 146:

> "The injury to Brooks did not arise out of or in the course of military duty. Brooks was on furlough, driving along the highway under compulsion of no orders or duty and on no military mission. A government owned and operated vehicle collided with him. Brooks' father, riding in the same car, recovered for his injuries and the government did not further contest the judgment, but contended there could be no liability to the sons, solely because they were in the army. This Court rejected the contention, primarily because Brooks' relationship while on leave was not analogous to that of a soldier injured while performing duties under orders."

It is thus clear that the *Feres* decision did not and does not apply to a discharged veteran who is not under orders or on active duty. In no wise did it limit or overrule the *Santana* decision. On the contrary, it specifically limited the implied exception to the Tort Claims Act to cases in which the plaintiff was on active duty.

In the *Brooks* decision (*Brooks v. United States* [1949], 337 U. S. 49, 69 S. Ct. 918), the Court said, at page 50:

> "The question is whether members of the United States Armed Forces can recover under that Act (Tort Claims Act) for injuries not incident to their service."

Page 51:

> "The statutes and terms are clear. They provide for District Court jurisdiction over any claim founded on negligence brought against the United States. We are not persuaded that 'any

claim' means 'any claim but that of servicemen.' The
20 statute does contain twelve exceptions. None exclude petitioner's claims."

Page 52:

"We are dealing with an accident which had nothing to do with the Brooks' army careers; injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented."

Page 53:

"Provisions in other statutes for disability payments to servicemen, and gratuity payments to their survivors, 38 U. S. C. 701, indicate no purpose to forbid tort actions under the Tort Claims Act. Unlike the usual Workmens Compensation Statute, eg., 33 U. S. C. 905, there is nothing in the Tort Claims Act or the Veterans Laws which provides for exclusiveness of remedy * * * In the very act we are construing, Congress provided for the exclusiveness of the remedy in three instances, numbers 403(d), 410(b) and 423 (now 28 U. S. C. A. 1346, 2672, 2679) and omitted any provision which would govern this case."

The *O'Neill* case, *supra*, also relies on *Johansen v. United States*, 343 U. S. 427 (1952), and *Lewis v. United States*, 89 U. S. App. D. C. 21, 190 F. 2d 22 (1951). Neither of these cases, however, has anything to do with either the Tort Claims Act or the Veterans Compensation Act. Both of them were questions of workmen's compensation as provided for under the Federal Employees Compensation Act of 1916 (5 U. S. C. A. 751, *et seq.*). The *Johansen* case held that having collected workmen's compensation, a civilian
21 employee on a public vessel could not sue the United States under the Public Vessels Act of 1925 (46 U. S. C. A. 781, *et seq.*), which allowed libels in admiralty.

In the *Lewis* case a member of the United States Park Police Force was shot by another member of the same police force engaged with him in the course of duty pursuing two fugitives. It was held that the Federal Employees Compensation Act was the exclusive remedy.

Bandy v. United States (D. C. Nevada 1950), 92 Fed. Supp. 360, is a case in point, however. The plaintiff therein was a veteran who had been discharged with a rheumatic fever disability, incurred while in service. He subsequently entered a Veterans Administration Hospital to receive examination and treatment, if necessary, of the rheumatic disability. In the course of receiving heat treatments, he was placed in an electric cabinet bath. Despite his complaint, he

was kept there too long. He became unconscious and suffered serious burns. On his action brought under the Tort Claims Act, the Court rejected the government's arguments that the plaintiff had made an election of remedies by obtaining compensation under the Veterans Compensation Act, and that his disability (the resulting scars) was a service-connected disability, for which he could not recover under the Tort Claims Act. The Court awarded $15,000.00 to the plaintiff.

In summary, there is a conflict of decisions in the Circuit Courts and the District Courts. The better law, and the law that conforms to the Supreme Court decisions in *Brooks* and *Feres* supports our contention that the plaintiff herein may pursue his remedy under the Tort Claims Act.

WHEREFORE, I respectfully pray that the defendant's motion be in all respects denied.

(Sworn to by Lee S. Kreindler, April 9, 1953.)

22 IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

OPINION BY JUDGE DIMOCK—June 3, 1953

Memorandum

This motion raises the question whether a discharged veteran who has suffered further injury as a result of treatment of service incurred injury in a Veteran's Administration Hospital and is receiving additional disability benefits for the resulting injury may recover under the Federal Tort Claims Act, 28 U. S. C. 2671, *et seq.* There is a square conflict of authority on this point. Holding that such a recovery may not be had are the recent cases of *O'Neill v. United States*, D. C. Cir., 202 F. 2d 366, and *Pettis v. United States*, D. C. N. D. Cal., 108 F. Supp. 500, while the opposite result was reached in *Santana v. United States*, 1 Cir., 175 F. 2d 330, and *Bandy v. United States*, D. C. D. Nev., 92 F. Supp. 360. I accept the reasoning of the *O'Neill* case.

The motion to dismiss the complaint for failure to state a claim upon which relief can be granted is granted.

Dated: June 3, 1953.

E. J. DIMOCK,
United States District Judge.

23 In United States District Court, Southern District of New York

ORDER AND JUDGMENT APPEALED FROM—June 23, 1953

This cause having come on for hearing on the defendant's motion to dismiss the action in that the Court lacked jurisdiction of the subject matter of the claim asserted therein under Rule 12(b) of the Federal Rules of Civil Procedure, and the Court having heard the argument of counsel thereto, it is, on motion of J. Edward Lumbard, United States Attorney for the Southern District of New York, attorney for the defendant.

ORDERED that the defendant's motion be granted and the complaint be and the same hereby is dismissed, and it is

FURTHER ORDERED that the defendant, United States of America, recover costs as taxed in the sum of $20.00 from the plaintiff Peter Brown and that execution issue therefor.

Dated: New York, N. Y., June 23rd, 1953.

E. J. DIMOCK,
U. S. D. J.

Judgment entered June 23rd, 1953.

WILLIAM V. CONNELL,
Clerk.

24 In United States District Court

NOTICE OF APPEAL—June 30, 1953

Sir:

Notice is hereby given that the plaintiff Peter Brown hereby appeals to the Court of Appeals for the Second Circuit from the order of the Honorable Edward J. Dimock, United States District Judge, dismissing the complaint herein, and from the judgment dismissing this action, together with costs as taxed in the sum of $20,000, entered in this action on June 24, 1953.

New York, N. Y.

Yours, etc.,

HARRY E. KREINDLER,
Attorney for Plaintiff-Appellant,
51 Chambers Street,
New York 7, New York.

To:

J. EDWARD LUMBARD, ESQ.,
United States Attorney for the
Southern District of New York,
Attorney for Defendant,
(Office & P. O. Address)
United States Court House,
Foley Square,
Borough of Manhatton,
City of New York.

25 STIPULATION AS TO CONTENTS OF RECORD (Omitted in printing)

26 STIPULATION OF ATTORNEYS APPROVING RECORD (Omitted in printing)

27-28 Clerk's Certificate to foregoing transcript omitted in printing.

29 In United States Court of Appeals for the Second Circuit

No. 87

Argued December 18, 1953

Docket No. 22826

[Title omitted]

Before: CLARK, FRANK and HINCKS, *Circuit Judges*

Appeal from a final order of the United States District Court for the Southern District of New York, Judge Dimock. REVERSED.

HARRY E. KREINDLER (Lee S. Kreindler, of counsel), *for appellant.*
J. EDWARD LUMBARD, United States Attorney for the Southern District of New York (Milton R. Wessel, of counsel), *for appellee.*

30 Plaintiff brought this suit against the United States, asserting a claim under the Federal Tort Claims Act, 28 U. S. C. secs. 1346(b), 2674 and 2680. The United States moved for summary judgment. On the basis of the complaint, the answers of the plaintiff to interrogatories and the affidavits filed by both parties the facts presented were as follows:

Plaintiff served in the Army Air Force from October 27, 1942 to August 6, 1944. During that time, while on active duty in New Guinea, he was injured in the left knee. He was hospitalized until his honorable discharge in August, 1944. At that time he could walk, but upon any sudden or strenuous movements, his left leg would become dislocated. On March 8, 1950, "he was operated upon by the Veterans Administration, for the purpose of 'cleaning up' the knee joint."

As, however, "his leg continued to dislocate frequently," he asked to be and was admitted, on October 1, 1951, to a Veterans Administration Hospital in New York. It was then decided that it would be well to perform another operation on the knee to prevent the leg from dislocating; it was to be a "bloodless operation, requiring the application of a tourniquet to the left thigh." In fact, on October 4, 1951, a tourniquet was thus applied by an operating room attendant in the employ of the Veterans Administration. As the tourniquet was defective, in that the pressure gauge did not register, an excessive amount of pressure was applied. "The attendant should have realized" the defect as soon as the tourniquet was applied, but he did not. As a result of the excessive pressure, the nerves in the plaintiff's leg were seriously and permanently injured. Plaintiff was awarded a pension by the Veterans Administration

at the time of his honorable discharge. This pension was increased because of the injury he sustained as a result of the operation in 1951.

31 On these facts, the United States contended that plaintiff's sole relief was under the Compensation Act, 38 U. S. C. sec. 501a. The District Court, agreeing with this argument, made an order dismissing the complaint. Plaintiff has appealed.

OPINION—January 5, 1954

FRANK, *Circuit Judge:*

Admittedly, plaintiff's claim is not within any explicit exception contained in the Tort Claims Act. In *Brooks* v. *United States*, 337 U. S. 49, the Court refused to read in an exception covering injuries to a serviceman, where the event causing the injury was not "incident to the service." In *Feres* v. *United States*, 340 U. S. 135, the Court considered three cases relative to injuries incurred while on active duty in the armed forces. In one of those cases, the injury resulted from negligence during the course of an abdominal operation; in another, death resulted from negligent medical treatment by army surgeons. The Court said: "The common fact underlying the three cases is that each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces." The Court held that, on these facts, the federal statutes expressly providing compensation for injuries of those in the armed service are exclusive "where the injuries arise out of or are in the course of activity incident to service," and that, accordingly, for such injuries there can be no recovery under the Tort Claims Act.

In the instant case, the plaintiff, while in active service, had been injured in the left knee during military operations in New Guinea. He received his discharge from the army in August 1944. Seven years later, in 1951, pursuant to his status as a veteran, an operation was performed, in a veterans' hospital, by employees of the government's Veterans Administration, on his left knee, for
32 the purpose of preventing the leg from dislocating. Due to negligence in the course of that operation, he received a further serious injury on which he grounded his suit. Plaintiff is receiving veteran's compensation for this injury, under 38 U. S. C. 501a.[1]

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[1] It is to be noted that 38 U. S. C. 501a covers compensation not only for an aggravation of an existing injury, but also for a new injury, suffered as the result of hospitalization or surgical treatment furnished under the compensation statute.

We think that these facts do not bring this case within the doctrine of *Feres* v. *United States*, since no injury of which plaintiff now complains was sustained while he "was on active duty and not on furlough." Moreover, we do not agree with the government's contention that plaintiff's claim is to be deemed merely an aggravation of his original injury and that it is therefore to be regarded just as if it had happened while he was on active duty.

The lower federal courts, in deciding similar cases, have disagreed with one another. *O'Neill* v. *United States*, 202 F. (2d) 366 (App. D. C.) favors the government's argument. However, it relies on *Feres* v. *United States* which, we think, not in point, and on *Johansen* v. *United States*, 343 U. S. 427, which we also regard as inapposite since it involved an interpretation of quite different statutes.[2] Also favoring the government is *Pettis* v. *United States*, 108 F. Supp. 500.[3]

On the other hand, *Santana* v. *United States*, 175 F. (2d) 320 (C. A. 1), and *Bandy* v. *United States*, 92 F. Supp. 360, sustain plaintiff's contention. With them we agree. It is urged that those decisions were rendered before *Feres*. We think that argu-
33-34 ment untenable, in the light of our interpretation of *Feres*.

Of course, we have not considered defenses the government may assert on the merits such as, *e.g.*, New York decisions limiting the liability of a hospital operated as an eleemosynary institution.

35-36 In United States Court of Appeals for the Second Circuit

PETER BROWN, PLAINTIFF-APPELLANT,

v.

UNITED STATES, DEFENDANT-APPELLEE

JUDGMENT—January 5, 1954

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged,

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[2] There the Court, referring to the *Feres* case, spoke of it (343 U. S. at 440) as relating to "soldiers on active duty."

[3] *Lewis* v. *United States*, 190 F. (2d) 22 (App. D. C.), related to an injury to a member of the U. S. Park Police incurred while on active duty.

and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

A. DANIEL FUSARO, *Clerk.*

37 Clerk's Certificate to foregoing transcript omitted in printing.

38 Supreme Court of the United States, October Term, 1953

No. 654

UNITED STATES OF AMERICA, PETITIONER,

vs.

PETER BROWN

ORDER ALLOWING CERTIORARI—Filed April 26, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

☆ U. S. GOVERNMENT PRINTING OFFICE 1954 900461 1569

No. [redacted]38

In the Supreme Court of the United States

OCTOBER TERM, 1953

UNITED STATES OF AMERICA, PETITIONER

v.

PETER BROWN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, PETITIONER

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PETER BROWN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on January 5, 1954.

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Southern District of New York (R. 22) is not reported. The opinion of the United States Court of Appeals for the Second Circuit (R. 29-31) is reported at 209 F. 2d 463.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1954 (R. 32). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an ex-serviceman who suffers injury as a result of negligent treatment in a Veterans Administration hospital and thereby becomes eligible for and receives federal compensation benefits "in the same manner as if such [injury] were service connected" may, in addition, maintain an action for damages against the United States under the Federal Tort Claims Act.

STATUTES INVOLVED

1. The Federal Tort Claims Act, 28 U.S.C. 1346(b), provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. Section 31, Act of March 28, 1934, 48 Stat. 526, 38 U.S.C. 501a, which extends to an ex-serviceman injured while hospitalized because of his former military service the same benefits as are granted to

servicemen for service-connected injuries, provides:

> Where any veteran suffers or has suffered an injury, or an aggravation of any existing injury, as the result of training, hospitalization, or medical or surgical treatment, awarded him under any of the laws granting monetary or other benefits to World War veterans, or as the result of having submitted to examination under authority of the War Risk Insurance Act or the World War Veterans' Act, 1924, as amended, and not the result of his misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, the benefits of Public Law Numbered 2, of Public Law Numbered 78, and of this title shall be awarded in the same manner as if such disability, aggravation, or death were service connected within the meaning of such laws; except that no benefits under this section shall be awarded unless application be made therefor within two years after such injury or aggravation was suffered, or such death occurred, or after the passage of this Act, whichever is the later date. The benefits of this section shall be in lieu of the benefits under the Act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes", approved September 7, 1916, as amended.

STATEMENT

Respondent Peter Brown's left knee was injured in the course of his World War II military service (R. 13). Because of that injury he was honorably

discharged from the Army on August 6, 1944, and awarded monthly compensation benefits by the Veterans Administration (R. 9, 13).

Seven years later, in October 1951, while still receiving these Veterans Administration benefits of $15 per month,[1] Brown applied for and, "pursuant to his status as a veteran," was admitted to a Veterans Administration hospital in New York "for the purpose of having an operation performed on his left knee" (R. 3, 14). In preparing Brown for surgery, a Veterans Administration operating room attendant applied an allegedly defective tourniquet causing serious injury to certain nerves in Brown's left leg (R. 3-5, 14). The monthly Veterans Administration benefits were thereafter increased to $119.70,[2] and Brown has been receiving this sum each month since April 1952, shortly after release from the hospital (R. 15).

Brown's complaint against the United States under the Federal Tort Claims Act, filed on April 14, 1952, in the United States District Court for the Southern District of New York, asserted that the Veterans Administration employees were negli-

[1] The Veterans Administration informs us that prior to and at the time of his entry into the Veterans Administration hospital on October 1, 1951, respondent was receiving $15 monthly as disability compensation from the Veterans Administration.

[2] The Veterans Administration has advised us that effective April 22, 1952, respondent was awarded disability compensation at the rate of $119.70 per month and that he is currently receiving that monthly compensation. The Veterans Administration further informs us that $88.20 out of each $119.70 monthly payment represents the amount paid to respondent as compensation for the injuries sustained by him at the Veterans Administration hospital in October 1951.

gent in using the defective tourniquet (R. 2-4, 14). The United States answered, denying negligence on the part of the Government (R. 6). It also moved to dismiss the complaint "on the ground that * * * [respondent's] exclusive remedy is the compensation statute, 38 U.S.C.A. 501a," *supra*, pp. 2-3 (R. 10, 15). This motion, the district court stated, raised "the question whether a discharged veteran who has suffered further injury as a result of treatment of service incurred injury in a Veterans Administration Hospital and is receiving additional disability benefits for the resulting injury may recover under the Federal Tort Claims Act" (R. 22). Noting "a square conflict of authority on this point," the district court accepted "the reasoning of" *O'Neil* v. *United States*, 202 F. 2d 366 (C.A. D.C.), granted the Government's motion, and dismissed the complaint (R. 22, 23).

On appeal, the Court of Appeals for the Second Circuit reversed (R. 29-31). While recognizing that the *ONeil* decision "favors the government's argument," the Second Circuit refused to follow it and held instead that Brown's eligibility and receipt of compensation benefits from the Veterans Administration for the same injuries for which he filed the Federal Tort Claims Act suit did not bar that suit (R. 31).

REASONS FOR GRANTING THE WRIT

The issue presented in this case is whether an ex-serviceman, who is negligently injured at a Veterans Administration hospital and thus becomes

eligible for administrative benefits under the same comprehensive and generous system of special statutory benefits available to military personnel for their service-connected injuries, may maintain an action against the United States for additional damages under the Federal Tort Claims Act. The court below has resolved this important and constantly recurring issue by holding that the ex-serviceman *may* recover additional damages under the Federal Tort Claims Act, despite his eligibility for the administrative benefits under the comprehensive plan. This holding is in direct and admitted conflict with *O'Neil* v. *United States*, 202 F. 2d 366, where the Court of Appeals for the District of Columbia Circuit held that because of the existence of the statutory benefit system the Federal Tort Claims Act must be interpreted to exclude tort claims of ex-servicemen based on Veterans Administration hospital malpractice. The need for review of the holding below is further emphasized by the fact that the conflict in decisions was precipitated by the refusal of the court below to give proper effect to this Court's holdings in *Feres* v. *United States*, 340 U.S. 135, and *Johansen* v. *United States*, 343 U.S. 427.

1. In *Feres* v. *United States*, 340 U.S. 135, the Court ruled that the existence of an administrative compensation system for death and injury of servicemen bars an action for additional damages under the Federal Tort Claims Act. Holding the Act inapplicable to servicemen's claims because a "comprehensive system of relief had [theretofore] been

authorized for them and their dependents by [prior] statute," the Court stated (340 U.S. 135, 140):

> The primary purpose of the [Federal Tort Claims] Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional.

Showing that that purpose would in no way be served by affording servicemen alternative relief under the Tort Claims Act, the *Feres* opinion emphasizes the "bearing upon it [of] enactments by Congress which provide systems of simple certain, and uniform compensation." 340 U.S. 135, 144.

The express terms of Section 31 of the Act of March 28, 1934, 38 U.S.C. 501a, *supra*, pp. 2-3, extend to ex-servicemen injured at Veterans Administration hospitals the identical benefits of the comprehensive and uniform compensation system available to veterans for service-connected injuries. Section 31 states that the ex-serviceman is to be awarded "benefits * * * in the same manner as if [his Veterans Administration injury or] disability, aggravation, or death were service connected." The extent of the Veterans Administration benefits thus made available to ex-servicemen is illustrated by benefit payments which have been paid and will continue to be paid to respondent for the injuries sustained by him at the Veterans Administration hospital in October 1951. For the twenty-two-month period since his release from the hospital in April 1952, the $119.70 monthly pay-

ments received by respondent total more than $2,600. Of this amount, $1,940 have been paid to him because of the injuries he sustained at the hospital.[3] Moreover, on the basis of his life expectancy, it is estimated that the total monthly compensation benefits to be paid by the Veterans Administration to respondent because of his hospital injuries will aggregate more than an additional $42,000.[4]

Since the basis for the exclusion in the *Feres* case of servicemen's injuries from the Tort Claims Act is the existence of the comprehensive and generous system of special administrative benefits for their injuries and since a closely related system is, as we have shown, fully available to respondent for his Veterans Administration hospital injuries, it follows that the instant claim must also be viewed as outside the coverage of the Federal Tort Claims Act. The Court of Appeals for the District of Columbia Circuit has so held in passing on this specific problem in *O'Neil* v. *United States*, 202 F. 2d 366. There, the court, recognizing that *Feres* stands for the proposition that the existence of this comprehensive and generous scheme of special adminis-

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[3] $1,940.40 is the product of 22 x $88.20, the portion of each monthly payment paid to respondent as compensation on his Veterans Administration hospital injuries. See footnote 2, *supra*, p. 4.

[4] The $42,000 estimate is based on the receipt of $88.20 per month over an expected life span of 40 years for a 30-year-old man. Statistical Abstract of the United States, 1953 (H. Doc. No. 99, 83d Cong., 1st Sess.), Expectation of Life Table, p. 69. See footnotes 1 and 2, *supra*, p. 4, and footnote 3, *supra*, this page.

trative benefits precludes resort to a tort action against the United States, held that the ex-serviceman's eligibility for compensation benefits for his Veterans Administration hospital injuries barred his Tort Claims Act suit (202 F. 2d 366, 367):

> * * * we think the basic principle of the [*Feres*] case covers this appeal. In Johansen v. United States, 343 U.S. 427, 539, 440, 72 S. Ct. 849, 856, 96 L. Ed. 1051 the Court said: "There is no reason to have two systems of redress. * * * This Court accepted the principle of the exclusive character of federal plans for compensation in Feres v. United States * * *."

This Court's decision in *Johansen* v. *United States,* 343 U.S. 427, cited in the *O'Neil* opinion, confirms the fact that the District of Columbia Circuit correctly understood and applied the *Feres* holding in excluding from the Tort Claims Act ex-servicemen's claims for negligent Veterans Administration hospital treatment. In *Johansen,* the Court held that the administrative benefits available under the Federal Employees Compensation Act precluded a government employee from suing the United States under the Public Vessels Act, even though at the time of the injuries there was no express declaration in the Federal Employees Compensation Act that its remedies were exclusive. Relying on *Feres,* and as if to eliminate all doubt that this Court viewed its *Feres* holding as being based on the "exclusive character" of the compen-

sation system, the *Johansen* opinion states (343 U.S. 427, 440, 441):

> * * * This Court accepted the principle of the exclusive character of federal plans for compensation in *Feres* v. *United States*, 340 U.S. 135. Seeking so to apply the Tort Claims Act to soldiers on active duty as "to make a workable, consistent and equitable whole," p. 139, we gave weight to the character of the federal "systems of simple, certain, and uniform compensation for injuries or death of those in armed services." P. 144. Much the same reasoning leads us to our conclusion that the Compensation Act is exclusive.
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> * * * * *
>
> * * * As the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect.

Despite the Court's statement in *Johansen* that *Feres* "accepted the principle of the exclusive character of federal plans for compensation," the opinion below brushes both *Feres* and *Johansen* aside as being "not in point" and "inapposite" (R. 31). It then goes into direct conflict with *O'Neil*, which, like *Johansen*, was based on this Court's decisions in *Feres*.

The only justification offered by the court below for its refusal to follow *Feres*, *Johansen*, and *O'Neil* was that the principle of exclusiveness of the administrative compensation plan bars only those soldiers who are injured in the performance of

their duty and hence does not preclude an ex-serviceman from maintaining a Federal Tort Claims Act suit for his post-service injuries. But *Feres*, being based on the "exclusive character" of the federal compensation plan, may not be given such a restricted reading. To the contrary, the reach of the *Feres* case is coextensive with the existence and availability of the administrative compensation plan. Moreover, the *Johansen* decision shows that the principle of exclusiveness of the compensation plan applies not only to servicemen but to civilian employees and in all situations where the plaintiff is eligible for the benefits of a comprehensive plan. And, with the exception of the decision below, the courts of appeals have recognized that the basis of the *Feres* and *Johansen* decisions was the acceptance of the exclusive character of the federal compensation plan and not the particular status or duty performed by the plaintiff at the time of his injury. See *O'Neil* v. *United States*, 202 F. 2d 366 (C.A. D.C.); *Lewis* v. *United States*, 190 F. 2d 22 (C.A. D.C.), certiorari denied, 342 U.S. 869; *Johansen* v. *United States*, 191 F. 2d 162 (C.A. 2),[5] affirmed, 343 U.S. 427; *United States* v. *Firth*, 207 F. 2d 665 (C.A. 9); *Sasse* v. *United*

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[5] Judge Frank, who wrote the opinion below, dissented from the majority view of the Court of Appeals for the Second Circuit in *Johansen*. 191 F. 2d at 163. This majority view was explicitly affirmed by this Court when the *Johansen* case came before it and "the reasoning of *Johnson* v. *United States*, 4 Cir., 186 F. 2d 120," on which Judge Frank based his dissent (191 F. 2d 163), was rejected by this Court at that time (343 U.S. 427, 439). Judge Frank's opinion below in the instant case resembles the views he expressed as a dissenter in *Johansen*.

States, 201 F. 2d 871, 873 (C.A. 7).[6] The opinion below conflicts, we submit, with all of these decisions.

2. The question presented here recurs constantly in the heavy volume of litigation against the United States under the Federal Tort Claims Act and, in the absence of an authoritative decision by this Court, will continue to arise, with opportunity for veterans to select favorable forums.[7] Veterans Administration malpractice actions filed by ex-servicemen are now pending in at least six different district courts throughout the country. Additional cases involving the proper scope of this Court's decision in *Feres* are now before several other lower courts. If it left unresolved, the conflict between the decision below, on one hand, and the *O'Neil* decision and those of the other courts of appeals, on the other hand, will doubtless result in uncertainty and difference in treatment of similar cases by the district courts.

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[6] *Santana* v. *United States*, 175 F. 2d 320 (C.A. 1), relied on in the opinion below, was decided before, and without the benefit of, this Court's decisions in *Feres* and *Johansen*. See *O'Neil* v. *United States*, 202 F. 2d 366, 367 (C.A. D.C.). *Santana* was based on this Court's earlier decision in *Brooks* v. *United States*, 337 U.S. 49. If certiorari is granted, we reserve the right to urge that while the Court's opinion in *Feres* sought to preserve *Brooks*, the reasoning of the *Feres* opinion undermines that upon which *Brooks* rests.

[7] A Federal Tort Claims Act plaintiff may sue in the judicial district where the act complained of occurred or, at his option, in the judicial district in which he may reside. 28 U.S.C. 1402(b).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition should be granted.

SIMON E. SOBELOFF,
Solicitor General.

MARCH, 1954.

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No. 38

In the Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, PETITIONER

v.

PETER BROWN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 38

UNITED STATES OF AMERICA, PETITIONER

v.

PETER BROWN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Southern District of New York (R. 13) is not reported. The opinion of the United States Court of Appeals for the Second Circuit (R. 16-18) is reported at 209 F. 2d 463.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1954 (R. 18). The petition for a writ of certiorari was filed on March 24, 1954, and was

granted on April 26, 1954 (R. 19). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. The Federal Tort Claims Act, 28 U.S.C. 1346 (b), provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. Section 31 of the Act of March 28, 1934, 48 Stat. 526, 38 U.S.C. 501a, provides:

> Where any veteran suffers or has suffered an injury, or an aggravation of any existing injury, as the result of training, hospitalization, or medical or surgical treatment, awarded him under any of the laws granting monetary or other benefits to World War veterans, or as

the result of having submitted to examination under authority of the War Risk Insurance Act or the World War Veterans' Act, 1924, as amended, and not the result of his misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, the benefits of Public Law Numbered 2, of Public Law Numbered 78, and of this title shall be awarded in the same manner as if such disability, aggravation, or death were service connected within the meaning of such laws; except that no benefits under this section shall be awarded unless application be made therefor within two years after such injury or aggravation was suffered, or such death occurred, or after the passage of this Act, whichever is the later date. The benefits of this section shall be in lieu of the benefits under the Act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes", approved September 7, 1916, as amended.

QUESTION PRESENTED

Whether an ex-serviceman who suffers injury in a Veterans Administration hospital as a result of negligent treatment of a service-connected disability and thereby becomes eligible for and receives federal compensation benefits "in the same manner as if such [injury] were service connected" may maintain an action against the United States to

recover damages for the injury under the Tort Claims Act.

STATEMENT

Respondent Peter Brown's left knee was injured in the course of his World War II military service (R. 8). Because of that injury he was honorably discharged from the Army on August 6, 1944, and awarded monthly compensation benefits by the Veterans Administration (R. 5, 8).

Seven years later, in October 1951, while still receiving these Veterans Administration benefits of $15 per month,[1] Brown applied for and, "pursuant to his status as a veteran," was admitted to a Veterans Administration hospital in New York "for the purpose of having an operation performed upon his left knee" (R. 1, 8). In preparing Brown for surgery, a Veterans Administration operating room attendant applied an allegedly defective tourniquet causing serious injury to certain nerves in Brown's left leg (R. 2, 8). The monthly Veterans Administration benefits were thereafter increased to $119.70, and, effective July 1, 1952, were again increased to $135.45.[2] Brown has been receiving

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[1] The Veterans Administration informs us that prior to and at the time of his entry into the Veterans Administration hospital on October 1, 1951, respondent was receiving $15 monthly as disability compensation from the Veterans Administration. Appendix B, *infra*, p. 53.

[2] Effective April 22, 1952, respondent was awarded disability compensation at the rate of $119.70 per month. On July 1, 1952, his monthly payment was increased to $135.45 and he is currently receiving that monthly compensation. Appendix B, *infra*, p. 54. The Veterans Administration further informs us that $89.70 out of each $119.70 monthly payment represented the amount paid to respondent as compensation

this sum each month since July 1952, shortly after release from the hospital (R. 9).

Brown's complaint against the United States under the Tort Claims Act, filed on April 14, 1952, in the United States District Court for the Southern District of New York, asserted that the Veterans Administration employees were negligent in using the defective tourniquet (R. 1, 8). The United States answered, denying negligence on the part of the Government (R. 3). It also moved to dismiss the complaint "on the ground that * * * [respondent's] exclusive remedy is in the compensation statutes, 38 U.S.C.A. 501a," *supra*, pp. 2-3 (R. 6, 8-9). This motion, the district court stated, raised "the question whether a discharged veteran who has suffered further injury as a result of treatment of service incurred injury in a Veterans Administration Hospital and is receiving additional disability benefits for the resulting injury may recover under the Federal Tort Claims Act" (R. 13). Noting "a square conflict of authority on this point," the district court accepted "the reasoning of" *O'Neil* v. *United States*, 202 F. 2d 366 (C.A. D. C.), granted the Government's motion, and dismissed the complaint (R. 13, 14).

On appeal, the Court of Appeals for the Second Circuit reversed (R. 16-18). While recognizing that the *O'Neil* decision "favors the government's argument," the Second Circuit refused to follow it

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for the injuries sustained by him at the Veterans Administration hospital in October 1951, and that $103.95 out of each $135.45 monthly payment "represents the portion allocable to his hospital injuries." Appendix B, *infra*, p. 54.

and held instead that Brown's eligibility and receipt of compensation benefits from the Veterans Administration for the same injuries for which he filed the Tort Claims Act suit did not bar that suit (R. 18).

SUMMARY OF ARGUMENT

The court below, in allowing a veteran to maintain an action under the Federal Tort Claims Act despite his eligibility for and receipt of Veterans Administration compensation benefits, has ignored the need for fitting the Act "into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." *Feres* v. *United States*, 340 U. S. 135, 139. Respondent, it is estimated, will receive more than $52,300 in administrative benefits for the claim on which his Tort Claims Act suit is predicated. These comprehensive benefits available to respondent and other veterans for Veterans Administration hospitalization injuries preclude recovery under the Tort Claims Act of additional compensatory damages from the United States.

I

A. This Court's decision in *Feres* v. *United States*, 340 U. S. 135, makes it plain that the comprehensive system of compensation benefits available to respondent is his sole remedy for his Veterans Administration hospitalization injury. In holding that veterans may not recover tort damages for injuries incurred while in service, *Feres* recognizes that the existence of a "comprehensive" system of relief for veterans and their dependents

bars an action under the Tort Claims Act. Later decisions by this Court, particularly *Johansen* v. *United States*, 343 U. S. 427, rely on *Feres* and make it even more apparent that the compensation system is the veteran's exclusive remedy. Various courts of appeals—in the Third, Fourth, Seventh, Ninth, and District of Columbia Circuits—have also relied on *Feres* for the same principle and have uniformly ruled that a suit against the United States for damages in tort must be dismissed where there exists a comprehensive statutory system authorizing administrative relief. Only the Court of Appeals for the Second Circuit, in the decision below, has refused to accept the *Feres* principle of exclusiveness of the compensation remedy.

United States v. *Gilman*, 347 U. S. 507, lends additional support to the rationale of the *Feres* case in that it holds that matters involving federal fiscal matters and federal relationships which have been the subject of peculiar legislative concern are not to be disposed of under the general language of the Tort Claims Act and ordinary common law concepts, but are to be left to the legislative branch of the Government for specific policy decision. Congress has provided veterans like respondent with a special remedy and the application of the *Gilman* doctrine would deny respondent the right to an additional recovery under the Tort Claims Act unless Congress now specifically directs otherwise.

B. Prior to 1946, Congress had created a complete and comprehensive system of law providing benefits for injuries sustained by veterans as a re-

sult of Veterans Administration hospitalization. The existence of this comprehensive compensation system, at the time of passage of the Tort Claims Act, manifests the full extent to which Congress, without regard to the Act, had recognized a public obligation to provide for Veterans Administration hospital injury or death claims.

1. Congressional consideration of the bill which later became the World War Veterans Act of 1924 reflects this legislative concern for adequate compensation provisions for such injury or death claims. Section 213 of that Act provided that veterans, injured by post-discharge hospitalization or medical treatment for which they were eligible by virtue of their military service, were to be awarded compensation benefits as if the injuries resulted from military service during the World War. In 1925, Congress expanded the coverage of Section 213 to authorize compensation for injuries sustained in the course of examinations for certain veterans benefits.

Although Section 213 was repealed by the Economy Act of March 20, 1933, the need for restoration of these compensation benefits for Veterans Administration hospital injuries soon forced its re-enactment as Section 31 of the Act of March 28, 1934. Section 31, under which respondent is now receiving monthly payments from the Veterans Administration, confers the same measure of benefits for hospital injuries as if the injuries were service-connected. In 1940 and 1943, Section 31 was broadened so that it now provides com-

pensation benefits to veterans injured through medical or surgical treatment or hospitalization to which they became entitled because of their military service, to veterans injured while being examined under any veterans' law, and to veterans injured while pursuing a vocational rehabilitation course.

Apart from Section 31, and prior to passage of Section 213, its 1924 predecessor, the Veterans Administration has consistently ruled that a veteran suffering an increase in a service-connected disability while being hospitalized is eligible for the full service-incurred compensation benefits available to servicemen and veterans. An increase in a service-connected disability is in no way dependent on the provisions or requirements of Section 31 or the earlier Section 213, and veterans injured as a result of medical treatment for service-connected disability were paid full compensation benefits prior to enactment of Section 213 in 1924 and during the period between Section 213's repeal in March 1933 and its reenactment as Section 31 of the 1934 Act. Even if the conditions for payment of benefits under Section 31 had not been present here, payment for the additional disability resulting from respondent's hospitalization for his service-connected condition would still have been made by the Veterans Administration.

2. Monthly compensation payments are provided for veterans who have incurred disabling injuries during their military service. The amount of monthly benefit may be as high as $491, depend-

ing on the degree of disability and the number of dependents. Since these statutory benefits apply to respondent's hospitalization injuries, he is now receiving monthly payments of $103.95 from the Government for the increased disability on which his instant Tort Claims Act suit against the Government is predicated. On the basis of his life expectancy, it is estimated that respondent will receive more than $52,300 from the Veterans Administration because of his hospital injuries.

This statutory compensation scheme reveals that Congress, prior to its passage of the Tort Claims Act, had already established an elaborate and carefully worked out statutory system for dealing with injuries or death of veterans as a result of Veterans Administration hospitalization.

II

The refusal of the court below to follow *Feres* was apparently based on its assumption that that rule applies only where the injuries sued for arose out of or in the course of activity incident to military service. *Feres*, however, cannot be so limited. Its reach is coextensive with the existence and availability of the compensation remedy. But even if the suggested limitation on *Feres* is accepted, there is no room for doubt that respondent's hospital injuries arose out of and incident to his service. Under settled principles of veterans' compensation law and of workmen's compensation law, a hospital aggravation of a work-connected or service-connected injury must be considered as having

arisen out of the employment or service to the same extent as the original injury. Thus, respondent's action under the Federal Tort Claims Act is barred even if his limited reading of *Feres* is accepted.

ARGUMENT

The issue presented by this case is whether an ex-serviceman, who is negligently injured at a Veterans Administration hospital and thus becomes eligible for administrative benefits under the same comprehensive system of special statutory benefits as is available to military personnel for their service-connected injuries, may maintain an action against the United States for additional damages under the Federal Tort Claims Act. These administrative compensation benefits are currently being paid to respondent for the same hospital injuries on which his Tort Claims Act suit is predicated. The monthly compensation benefits will aggregate, it is estimated, the sum of $52,300.[3]

It is our position that the generous benefits of this compensation system constitute the veteran's exclusive remedy against the United States and preclude his recovery of additional damages from the United States under the Tort Claims Act. That Act, as this Court has ruled in rejecting another claim for additional damages brought by a serviceman "after plaintiff was discharged," cannot be invoked where "a comprehensive system of relief had [theretofore] been authorized for them and their dependents by [a prior compensation]

[3] See *supra*, pp. 4-5; *infra*, p. 40.

statute." *Feres* v. *United States*, 340 U. S. 135, 137, 145. In view of the availability of compensation benefits under the same comprehensive system of relief, we submit that the *Feres* ruling applies with equal force and calls for rejection of respondent's claim for his post-discharge hospital injuries.

The conceded availability of the compensation remedy is, by itself, sufficient to bar the respondent's tort action for additional damages and the judgment below should for that reason be reversed. Respondent, however, insists, and the court below agreed, that suit under the Act is precluded only where the availability of the compensation remedy is coupled with the further showing that the ex-servicemen's injuries arose out of or in the course of activity incident to the performance of his specific duties. We do not agree with this limitation, but even if it be accepted the settled principles of compensation law compel the holding that respondent's injuries arose out of his service and were incident thereto. Consequently, the judgment below must fall even when measured against the proper application of the very theory relied on by respondent and adopted below.

I

The Existence of a Comprehensive and Uniform Federal System of Compensation Benefits for Ex-Servicemen Injured as a Result of Veterans Administration Hospitalization Precludes Additional Recovery of Damages Under the Federal Tort Claims Act

A. *In general, the creation by the Government of a comprehensive system of compensation benefits precludes the beneficiary from receiving damages for the same injury under the Tort Claims Act.*

It is a settled principle that where Congress, over a long period of time and through a series of enactments, has legislated with respect to a particular subject matter in such a manner as to create a complete and inclusive system for dealing therewith, subsequent statutes of general scope, which would otherwise apply, are normally held to be inapplicable to the special subject matter. *United States* v. *Barnes*, 222 U. S. 513, 520; *United States* v. *Sweet*, 245 U. S. 563; *Ozawa* v. *United States*, 260 U. S. 178, 193, 194; *United States* v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386, 396; *United States* v. *American Trucking Associations*, 310 U. S. 534, 544; *Townsend* v. *Little*, 109 U. S. 504, 512; *United States* v. *Fixico*, 115 F. 2d 389, 393 (C. A. 10); *Iriarte et al.* v. *United States*, 157 F. 2d 105, 108 (C. A. 1). See also *infra*, pp. 15-23.

This rule applies with full force in determining whether claim statutes of general application, such as the Federal Tort Claims Act, are to be con-

strued so as to authorize relief with respect to claims theretofore covered by a comprehensive administrative and statutory system. This Court has already so held in a case presenting the issue now again before the Court, *i. e.*, whether the existence of an extensive compensation system for service-incurred injury or death bars an action for additional damages under the Federal Tort Claims Act. Answering this question in the affirmative in *Feres* v. *United States*, 340 U. S. 135, 140, the Court, without dissent, held the Tort Claims Act inapplicable to claims by servicemen or their dependents primarily because a "comprehensive system of relief had [theretofore] been authorized for them and their dependents by [prior] statute."

As we show in detail below (*infra*, pp. 27-41), this same comprehensive system of relief applies to respondent and compensation is now being paid by the Veterans Administration for his hospital injuries. Consequently, the *Feres* holding that the existence of this "comprehensive system of relief" for veterans and their dependents bars their later action under the Tort Claims Act is, we submit, dispositive here and calls for reversal of the judgment below. We do not believe that the *Feres* holding, as suggested by the Court of Appeals, turned on the fact that the soldiers' injuries arose out of or in the course of activity incident to their military service (R. 17).[4] To the contrary, analysis

[4] Even if this limitation on the *Feres* holding should be accepted, we show below that respondent's hospital injuries must be considered as having arisen out of or in the course of activity incident to his military service. *Infra*, pp. 41-47.

of the *Feres* opinion (and later decisions by this and other courts) makes it clear that the *ratio decidendi* of the *Feres* exclusion from the Tort Claims Act of veterans' claims for service injury or death was the existence of the comprehensive compensation system, the benefits of which are fully available to respondent.

1. *The holding* in *Feres* v. *United States*, 340 U. S. 135, *is based on the exclusiveness of the compensation remedy.*—Throughout the *Feres* opinion, the Court makes it clear that its decision rested primarily on the existence of the compensation system. Thus, in 340 U. S. at 139, the Court remarked that all considerations suggesting that veterans' claims are cognizable under the Tort Claims Act must be swept aside because this Act must "be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government." With clear reference to this prior "system of remedies", the Court declared that (340 U. S. at 140)—

> The primary purpose of the [Federal Tort Claims] Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional.

And the opinion later points out expressly that the "system of remedies" and the benefits referred to were the "enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death" of servicemen. 340

U. S. at 144. Noting that this "compensation system, which normally requires no litigation, is not negligible or niggardly * * * [and] compares extremely favorably with those provided by most workmen's compensation statutes," the opinion concludes that this "comprehensive system of relief" must, "in the absence of express congressional command" in the Tort Claims Act to the contrary, be considered as the exclusive remedy for veterans and their dependents. 340 U. S. 140, 145, 146.[5]

2. *Subsequent decisions fortify the view that the Feres case was based on the exclusiveness of the compensation remedy.*—That the existence of the uniform and comprehensive compensation system for injury or death of servicemen was the basis of the *Feres* decision is made even more appparent by later rulings of this Court interpreting and applying that case. In *Johansen* v. *United States*, 343 U. S. 427, the Court held that the administrative benefits available under the Federal Employees Compensation Act precluded a government employee from suing the United States under the Public Vessels Act, even though at the time of the injuries for which damages were sought there was no express declaration in the Federal Employees Compensation Act that the remedies thereunder were

[5] It is worthy of emphasis that in none of the three cases decided in the *Feres* opinion was the plaintiff still in the military service when suit was brought. *Jefferson* was a veteran (340 U.S. at 137), and the *Griggs* and *Feres* suits were brought by the soldiers' executrices and dependents (340 U.S. at 136, 137). As noted by the Court in the *Feres* opinion, the actions were "by widows or surviving dependents" or were "brought after the individual was discharged". 340 U. S. at 145.

exclusive. Eliminating all doubt that the Court viewed the *Feres* holding as being based on the "exclusive character" of the compensation system, the *Johansen* opinion states (343 U. S. 427, 440, 441):

> * * * This Court accepted the principle of the exclusive character of federal plans for compensation in *Feres* v. *United States*, 340 U. S. 135. Seeking so to apply the Tort Claims Act to soldiers on active duty as "to make a workable, consistent and equitable whole," p. 139, we gave weight to the character of the federal "systems of simple, certain, and uniform compensation for injuries or death of those in armed services." p. 144. Much the same reasoning leads us to our conclusion that the Compensation Act is exclusive.
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> * * * As the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect.

Shortly thereafter, in *Dalehite* v. *United States*, 346 U. S. 15, the Court again reiterated the basis for its decision in the *Feres* case by pointing out that it was "the existence of a uniform compensation system" which "led us [in the *Feres* case] to conclude that Congress had not intended to depart from this system and allow recovery by a tort action dependent on state law." 346 U. S. 15, 31, note 25.

The various courts of appeals, with the exception of the decision below, have also understood the

Feres case to stand for the proposition that the existence of a comprehensive and generous scheme of special statutory benefits forecloses resort to a tort action against the United States. In *Lewis* v. *United States,* 190 F. 2d 22, certiorari denied, 342 U. S. 869, the District of Columbia Court of Appeals held that a U. S. Park policeman whose compensation statute, like that of the employees in *Johansen* and the veterans in *Feres,* contained no express declaration of exclusiveness was nevertheless barred by virtue of the compensation statute from maintaining a Tort Claims Act suit. After quoting this Court's language in *Feres* as to the importance of "enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services," the court of appeals observed (190 F. 2d 22, 23):

> By parity of reasoning we think the same result must be reached in this case. Like the soldier in the *Feres* case, the Park Policeman obtains the benefit of "systems of simple, certain, and uniform compensation for injuries or death." Members of the Park Police are by congressional enactment entitled "to all the benefits of relief and retirement" furnished by the "policemen and firemen's relief fund, District of Columbia." That "statutory scheme contemplates a broad system of relief, by way of medical and hospital care and treatments, pensions, retirement. * * *" As was said in the *Feres* case, "If Congress

> had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other." 340 U. S. 135, 144. * * *

Similarly, in *O'Neil* v. *United States*, 202 F. 2d 366 (C.A. D.C.), the court, holding that the veteran's eligibility for compensation benefits for his Veterans Administration hospital injury precluded his Tort Claims Act suit, stated (202 F. 2d 366, 367):

> * * * we think the basic principle of the [*Feres*] case covers this appeal. In *Johansen* v. *United States*, 343 U. S. 427, 439, 440, 72 S. Ct. 849, 856, 96 L. Ed. 1051 the Court said: "There is no reason to have two systems of redress. * * * This Court accepted the principle of the exclusive character of federal plans for compensation in *Feres* v. *United States* * * *."[6]

Still other courts of appeals' decisions recognize that the basic principle of the *Feres* case is its ac-

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[6] For district court decisions ruling that the veteran's eligibility for compensation benefits bars a Tort Claims Act suit for Veterans Administration hospital injuries, see *Pettis* v. *United States*, 108 F. Supp. 500, 501 (N.D. Cal.), where the court noted that "under the Supreme Court decision in *Feres* v. *United States*, 340 U.S. 135, plaintiff is precluded from suing under the Tort Claims Act"; *McCalop, Admr.* v. *United States* (E.D. N. Car., No. 551, unreported decision dated Jan. 26, 1954), holding that the "veteran's estate may not recover under the Federal Tort Claims Act for disability or death arising out of treatment in the veterans' facility for which his estate has already been awarded disability compen-

ceptance of the exclusive character of federal compensation plans. The Third Circuit in *Mandel* v. *United States*, 191 F. 2d 164, affirmed *sub nom. Johansen* v. *United States*, 343 U. S. 427, held that "an injured person who is eligible to compensation [cannot] claim additional rights against the United States" and based its decision in part on its understanding that the Supreme Court, in *Feres*, had "relegated [veterans] to their compensation and pension remedies." 191 F. 2d 164, 166, 168. Both the Court of Appeals for the Fourth Circuit in *Jefferson* v. *United States*, 178 F. 2d 518, and the Court of Appeals for the Second Circuit in *Feres* v. *United States*, 177 F. 2d 535, whose decisions were affirmed in the *Feres* case, forecast the rationale of that decision by concluding that "the provision which Congress has made for military persons in the form of disability payments and pensions" (178 F. 2d 518, 519) made suit under the Tort Claims Act inappropriate.

The decision of the Court of Appeals for the Ninth Circuit in *United States* v. *Firth*, 207 F. 2d 665, also takes the same view. In directing the

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sation 'as if such disability were service connected' for the two are incompatible"; and *Engelman* v. *United States* (S.D. Cal., No. 1128, unreported decision dated August 12, 1953), holding that because of the veteran's "exclusive remedy under the compensation system" he "was foreclosed from instituting an action against the United States under the Federal Tort Claims Act." Compare *Sigmon* v. *United States*, 110 F. Supp. 906, 911 (W.D. Va.), holding in another Tort Claims suit that Congress intended "to provide this measure of [administrative] compensation * * * and only this measure" for prisoners negligently injured in a federal reformatory.

dismissal of a wrongful death action filed against the United States under the Public Vessels Act, the court, relying on the *Johansen* case, which as we have shown was itself based on the *Feres* principle of the exclusive character of the compensation remedy, pointed out that the decedent's "heirs must look to the Federal Employees Compensation Act for relief." And the Seventh Circuit Court of Appeals, in directing that a Tort Claims Act complaint be dismissed and that the claimant be remitted to his compensation remedy, also pointed out that *Johansen* "is decisive of the question of exclusiveness of the remedy afforded injured employees by the Federal Employees Compensation Act." *Sasse* v. *United States*, 201 F. 2d 871, 872. See also *Archer* v. *United States*, 112 F. Supp. 651 (S. D. Cal.) (pending on appeal, No. 13930, C.A. 9).[7]

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[7] Identical considerations have compelled courts considering various other types of legislation permitting suit against the United States to hold that the administrative compensation remedy precludes alternative relief under the statute authorizing suit. In *Dobson* v. *United States*, 27 F. 2d 807 (C.A. 2), certiorari denied, 278 U.S. 653, the court stated (27 F. 2d 808, 809):

> Verbally, there is nothing [in the Public Vessels Act] which excludes liability for damage to property or person of officers or crew. * * *
>
> Nevertheless, the construction contended for by appellants involves so radical a departure from the government's long-standing policy with respect to the personnel of its naval forces that we cannot believe the act should be given such a meaning. The statute itself does not specify who may maintain suits under it. To allow suit by the officers and crew of the public vessel for damage caused by it to them would be too great a reversal of policy to be enacted by such general terms. The Act of

In sum, the *Feres* case, as applied by this Court and by all courts of appeals other than the court below, requires that a suit for damages be dismissed where there exists a comprehensive statu-

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October 6, 1917 (40 Stat. 389 [34 U.S.C.A. Sections 981, 982]) directs the Paymaster General of the Navy to reimburse officers, enlisted men, and others in the naval service * * *.

Chapter 3, title 38, United States Code (38 U.S.C.A. Sections 151-206) provides an elaborate pension system for personal injury and loss of life incurred by officers and enlisted men in the navy. These pensions may be thought an inadequate substitute for the recovery of full damages under the Public Vessels Act of March 3, 1925, but they were well known to all who entered the naval service. * * * If it had been the purpose to change that policy as respects officers and seamen of the navy injured by the unseaworthiness of a public vessel, or by the fault of one another, because that is what in the end it comes to, we cannot think it would have been left to such general language as is to be found in the above-quoted section 1. * * *

We believe that Congress meant to leave upon the members of the naval forces the same risks of injuries suffered in the service of the United States as they had before.

Similarly, in *Bradey* v. *United States*, 151 F. 2d 742 (C.A. 2), certiorari denied, 326 U.S. 795, Chief Judge Learned Hand stated (151 F. 2d at 743):

It is quite true that nothing in the text of the Public Vessels Act bars suit by a member of the armed forces, but in *Dobson* v. *United States*, 2 Circ., 27 F. (2d) 807, cert. den. 278 U.S. 653, 49 S. Ct. 179, 73 L. Ed 563, we held that, because of the compensation elsewhere provided for such persons, they must be deemed excluded from its protection. That case directly rules here; and to succeed, the libellant must prevail upon us to overrule it. This she attempts to do on the ground that the course of judicial decision since then discloses a change of attitude toward such sufferers.

We find no evidence of such a change, nor do we see any antecedent reason to think that we were wrong before. * * * The compensation provided for the Navy is indeed not the same as that provided under the United States

tory system authorizing administrative relief. The reach of the *Feres* case, therefore, is coextensive with the existence and availability of the administrative compensation plan.[8]

This uniform understanding of the *Feres* case shows that respondent can draw no comfort from *Santana* v. *United States*, 175 F. 2d 320 (C.A. 1) and *Bandy* v. *United States*, 92 F. Supp. 366 (D. Nev.). Both of those cases were decided before, and without the benefit of, this Court's decisions in *Feres* and *Johansen*. Cf. 25 A.L.R. 2d 249, note

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Employees Compensation Act, 5 U.S.C.A. § 751 et seq.; but that makes no difference. We are to assume that each is deemed adequate for the occasion; particularly since it is certain, and does not depend upon proof of fault. We conclude that Congress regards the two remedies as mutually exclusive; and the decree will be affirmed.

Accord: *Goldstein* v. *New York*, 281 N.Y. 396, 403, 24 N.E. 2d 97; *Seidel* v. *Director General of Railroads*, 149 La. 414, 89 So. 308; *Moon* v. *Hines*, 205 Ala. 355, 87 So. 603; *Bryson* v. *Hines*, 268 Fed. 290 (C.A. 4); cf. *Posey* v. *T.V.A.*, 93 F. 2d 726, 728 (C.A. 5).

[8] A claim for tort "damages has almost invariably been denied where some applicable workmen's compensation act existed under which the employee could have claimed compensation." *Jonathan Woodner Co.* v. *Mather*, 210 F. 2d 868, 873 (C.A. D.C.). Limiting the private employee to workmen's compensation benefits cannot be viewed as discriminating against him even though a third party suffering the same damages through the negligence of the same employer would have access to court action against the employer. See *State* v. *Swope*, 56 N. Mex. 782, 251 P. 2d 266, and cases there collected. Similarly, restricting veterans or their dependents to the analogous and frequently more generous benefits of the military and veterans laws cannot be viewed as discriminatory. In both instances, relief for injury or death is not subject to the uncertainties, expense, and delay of litigation but is guaranteed through direct, certain, administrative payments.

19. See also *O'Neil* v. *United States*, 202 F. 2d 366, 367 (C.A.D.C.), rejecting the *Santana* decision because it "was decided before the *Feres* case." Nor do we believe that respondent's reliance on this Court's earlier opinion in *Brooks* v. *United States*, 337 U. S. 49, is justified. The *Feres* decision makes it plain that any subsisting effect of the *Brooks* case must be restricted to the particular factual situation involved in that case, *i.e.*, a serviceman injured, while on furlough or leave, in circumstances wholly unrelated to his service. The instant case presents no such factual situation, and the development of doctrine in this field indicates that *Brooks* is not to be extended beyond its own particular confines.

3. *The decision in United States* v. *Gilman*, 347 U. S. 507, *furnishes an additional reason for applying the doctrine of the Feres case to a veteran, who has the benefit of a special statutory scheme of compensation.*

The recent decision of this Court in *United States* v. *Gilman*, 347 U. S. 507, lends much support to the rationale of the *Feres* decision. In that case the United States sued an employee for indemnity for damages in which it had been cast as a result of the employee's negligence, relying on the common-law right of an employer to be indemnified by an employee for whose negligence it had been held liable to a third party. In holding that the United States could not recover, the Court observed (p. 509):

> The relations between the United States and its employees have presented a myriad of problems with which the Congress over the years has dealt. Tenure, retirement, discharge, veterans' preferences, the responsibility of the United States to some employees for negligent acts of other employees—these are a few of the aspects of the problem on which Congress has legislated. Government employment gives rise to policy questions of great import, both to the employees and to the Executive and Legislative Branches. * * *

And after discussing the problems involved, considering both the morale and efficiency of the employees and the financial and fiscal burdens of the Government, the Court concluded that the questions concerned fiscal matters for which Congress alone should formulate the policy, citing its prior decision in *United States* v. *Standard Oil Co.*, 332 U. S. 301. The Court concluded (pp. 511-513):

> The reasons for following that course in the present case are even more compelling. Here a complex of relations between federal agencies and their staffs is involved. Moreover, the claim now asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of that policy, which is most advantageous to the whole, involves a host of considerations that must be

weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them.

In the present case, we have the relationship between the Government and the veterans of its various wars—a close and intimate relationship which has been the subject of even greater legislative concern than that of government and employee. Congress continually deals with the rights and privileges of veterans against the Government in various aspects.[9] In *Gilman*, a comparable relationship moved the Court to deny the Government's claim under general law, even though Congress had not taken any position on the particular issue before the Court (347 U. S. at 511). Here, Congress has taken a stand, at least inferentially, and over the years has provided a special remedy which is adequate and comprehensive (see *infra*, pp. 27-41). There is, therefore, greater reason for holding that the question of whether to grant to veterans the additional right to recover under the general terms of the Tort Claims Act for the same injuries for which they may recover compensation is a policy question which should be left to Congress.

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[9] There is set forth in Appendix A, *infra*, pp. 49-52, a brief resume of the statutes relating to veterans. See *infra*, pp. 27-41, for the history and details of the compensation system available to veterans.

B. *Congress has provided a complete and comprehensive compensation system for injury or death of ex-servicemen as a result of treatment at a veterans hospital.*

The comprehensiveness and adequacy of the compensation system set up by Congress for caring for veterans injured through Veterans Administration hospitalization is made apparent by (a) the detailed congressional enactments for such injuries over the past thirty years, (b) the incorporation by Congress into those acts of the elaborate compensation system developed for injured and disabled soldiers and their dependents, and (c) the nature and extent of the compensatory benefits available under the current legislation. These statutory benefits are equally available to veterans injured in the course of treatment of a service-connected or of a non-service-connected condition.[19] Their breadth and coverage underscore the full extent to which the Government, at the time of passage of the Tort Claims Act, recognized a public obligation to provide for Veterans Administration hospital injury or death claims.

1. *The statutory system for compensating veterans for injuries caused by Veterans Administration hospitalization.* More than thirty years ago, Congress concerned itself with the need for extend-

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[19] The coverage of the compensation system with respect to veterans who, like respondent, are injured while being hospitalized for service-connected injuries, is also supportable on grounds independent of the legislation dealing with injuries at veterans' hospitals. See *infra*, pp. 32-38.

ing adequate compensation to veterans injured as a result of Veterans Administration hospitalization. A complete consolidation and re-enactment of laws pertaining to veterans was introduced in 1924 in the First Session of the Sixty-Eighth Congress. Early in the consideration of S. 2257, the bill by which the consolidation was effected, the need for compensating "injuries or death resulting from hospitalization" was expressed. S. Rept. 397 on S. 2257, 68th Cong., 1st Sess., p. 5. A specific amendment to compensate such injuries "in the same manner as though such injury had occurred in military service" was accordingly added to S. 2257 and agreed to without objection. *Ibid;* cf. 65 Cong. Rec. 5458, 7471. In this amended form, S. 2257 became law as the World War Veterans Act of June 7, 1924. Section 213 of that Act, setting forth the language of the amendment, directed that veterans who suffered injury, disability, or death as the result of post-discharge hospitalization or medical or surgical treatment for which they had become eligible by virtue of their military service, were to be "awarded" compensation benefits "in the same manner as though such disability, aggravation, or death was the result of military service during the World War." 43 Stat. 623.

Less than a year later, Congress expanded the coverage of Section 213 and extended its benefits to veterans injured in the course of medical examinations "made in the diagnosis" of their cases. 66 Cong. Rec. 5262. H. R. 12308, 68th Cong., 2d

Sess., which became the Act of March 4, 1925 (43 Stat. 1302), authorized compensation benefit payments for injuries caused by examinations for veterans benefits under the War Risk Insurance Act (38 Stat. 711) or the World War Veterans Act of 1924 (43 Stat. 615).

Section 213, as so expanded, remained in effect until its repeal by the Economy Act of March 20, 1933 (48 Stat. 11). However, the need for restoring these compensation benefits soon made itself evident. Congress reenacted Section 213 as Section 31 of the Act of March 28, 1934 (48 Stat. 526, 38 U.S.C. 501a). Section 31, as was explained to the Congress which passed it, "is a mere reenactment of the law as it existed prior to the Economy Act." 78 Cong. Rec. 3298. That section, under which respondent is now receiving monthly payments from the Veterans Administration, authorizes compensation for "any veteran" injured or killed as the result of post-discharge "hospitalization, or medical or surgical treatment, awarded him under any of the laws granting monetary or other benefits to World War veterans, or as the result of having submitted to examination" under the War Risk Insurance Act (38 Stat. 711) or the World War Veterans Act of 1924 (43 Stat. 615). This statute, like the earlier Section 213, prescribes the same measure of benefits "as if such disability, aggravation, or death were service connected" within the meaning of the laws granting benefits to World War veterans.

Congressional insistence upon broadening the scope of the compensation scheme developed for compensating veterans injured in Veterans Administration hospitals led to a further extension of its benefits in 1940. The 1934 statute, as has been noted, limited its coverage, with respect to injuries to a veteran submitting to an examination, to those veterans examined under the two specified statutes —the War Risk Insurance and World War Veterans Acts. In the 76th Congress, Section 12 of the Act of October 17, 1940 (54 Stat. 1197, 38 U.S.C. 501a-1) removed this limitation and extended the benefits to veterans who suffered injury as a result of having submitted to examination under authority of "*any of the laws* granting monetary or other benefits to World War veterans" (emphasis added).

The legislative history of H. R. 8930, 76th Cong., 3d Sess., which was enacted as Section 12 of the Act of October 17, 1940, confirms the consistent congressional purpose to extend this compensation system as far as possible. Section 12 which did not appear in the bill as introduced into the House was added by the Senate with the following explanation (86 Cong. Rec. 13490):

> Under the existing provisions of Public, No. 141, 73d Congress [Sec. 31, Act of March 28, 1934], compensation is restricted to injuries or aggravation resulting from examinations under the War Risk Insurance Act or the War Veterans Act, 1924, as amended. The section

> [12] would extend the right to benefits in connection with examinations under existing laws other than those heretofore specified.

And the Report of the Senate Committee on Finance on H. R. 8930 shows that Section 12 would implement the expansion of coverage of the compensation system by providing "for the payment of benefits on the same basis with respect to injuries sustained as the result of examination under any of such laws." S. Rept. 2198, 76th Cong., 3d Sess., p. 12.

Three years later, in 1943, Congress once again extended the coverage of this compensation system. By the Act of March 24, 1943 (57 Stat. 43, 44) Veterans' Regulation No. 1(a) was amended so as to make these benefits available to any World War II veteran who "suffers an injury or an aggravation of any injury, as a result of the pursuit of such course of vocational rehabilitation."

Thus, the 1924 statute, as expanded in 1925, reenacted in 1934, and further supplemented by the 1940 and 1943 enlargements of its coverage, provides compensation benefits to any veteran injured (1) as a result of medical or surgical treatment or hospitalization to which he became entitled because of his military service, (2) while being examined under any of the veterans laws, or (3) in a vocational rehabilitation course.

There are additional factors, apart from the broad category of permissible beneficiaries, manifesting the comprehensiveness of this benefit sys-

jury of a veteran at a Veterans Administration hospital and that respondent's action for additional damages under the Tort Claims Act is accordingly barred. Respondent, however, has pointed to this Court's statement in *Feres* that that case was concerned with injuries which "arise out of or are in the course of activity incident to [military] service." 340 U. S. 135, 146. This statement, respondent contends, means that more than the existence of a comprehensive system of administrative benefits to compensate a plaintiff is required to bar his tort action. It must also be shown, respondent argues and the court below agreed, that the injuries arose out of or in the course of service (R. 17). Our discussion in Point I shows, we believe, that it misreads the *Feres* doctrine to stress service incidence as the controlling factor; the significant element is the comprehensiveness of the federal compensation scheme open to the injured person. *Supra*, pp. 13-24. But we submit that even under respondent's theory the hospital injuries sustained by him arose out of and incident to his service, and his claim thus falls within the area in which he himself concedes that suit under the Tort Claims Act is barred.

In order fully to understand what this Court meant by service-incidence when, in the *Feres* case, it excluded from the coverage of the Tort Claims Act claims which "arise out of or are in

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statutes, see State Veterans Laws (79th Cong., 1st Sess., House Committee Print No. 81). See also Appendix A, *infra*, pp. 39-52.

the course of activity incident to service," it is helpful to examine the holding in *Brooks* v. *United States*, 337 U. S. 49. There, the Court, in permitting recovery for injuries to members of the armed services on furlough, stated, "But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented" (p. 52). In *Feres*, this Court stated, "The only issue of law raised is whether the Tort Claims Act extends its remedy to one sustaining 'incident to the service' what under other circumstances would be an actionable wrong. This is the 'wholly different case' reserved from our decision in *Brooks* v. *United States*, 337 U. S. 49, 52" (340 U. S. at 138). While the Court wisely did not define specifically what is meant by "incident to service," the phrase unquestionably carries a connotation beyond actions performed pursuant to military orders. The discussion of geographic considerations in the *Feres* opinion (340 U. S. at 143) discloses that much.

The language "arising out of or in the course of activity incident to service" paraphrases, at the least, the established concept of "arising out of and in the course of employment" in workmen's compensation law. And this Court's use in *Feres* of the terms "arising out of or in the course of activity incident to service" interchange-

tem. It is especially significant that the benefits payable under Section 31 of the 1934 statute (38 U.S.C. 501a) to a veteran injured at a Veterans Administration hospital are not limited to situations involving negligence or malpractice. Even where the disability incurred at the hospital results from "error in judgment" or "an accident," compensation payments will be made to the veteran. 38 C.F.R. 3.123(b)(4); 9 Comp. Gen. 515, 516. Furthermore, in line with the broadening of the area of coverage of the 1934 statute, a contagious disease contracted by a veteran while hospitalized in a Veterans Administration hospital has been administratively construed to be a compensable "injury" within the meaning of that term as used in the statute. Decisions of the Administrator of Veterans' Affairs, No. 716, Vol. 1, Supp. 1, p. 1., July 8, 1946. [11]

2. *Comprehensive compensation coverage for injury to veterans, like respondent, hospitalized for service-connected conditions is supportable independently of the statute.* As already noted, Section

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[11] In that case, the Administrator of Veterans' Affairs decided that "compensation payments are in order" where "the veteran is discharged from the Veterans Administration hospital after prostatectomy and two days later developed diphtheria to which he had been exposed while at the Veterans Administration hospital. He was taken from his home to a non-Veterans Administration hospital for treatment of this disease." Decisions of the Administrator of Veterans' Affairs, No. 716, Vol. 1, Supp. 1, pp. 1, 2, July 8, 1946. For still further administrative expansion of the scope of Section 31, see Decisions of the Administrator of Veterans' Affairs, No. 805, Vol. 1, Supp. 3, p. 56, February 7, 1949.

31's benefits are not limited to veterans who are hospitalized or treated for service-connected conditions but are equally available to those hospitalized or treated for non-service-connected conditions.[12] However, it is significant that broad protection is also afforded, without regard to Section 31, to veterans who, like respondent, report to Veterans Administration hospitals for treatment of a service-connected condition. It has consistently been held by the Veterans Administration, even prior to Section 213 of the Act of June 7, 1924, that a veteran, suffering an increase in a service-connected disability while being hospitalized and treated for that disability, is entitled to the full compensation benefits he would have been eligible for had the aggravation been actually incurred during his active military service. Thus, where a veteran died while undergoing treatment at a Veterans Administration hospital for a service-connected disability, it was held, even before Section 213 became law in 1924, that veterans' benefit payments should be made because the "death can be regarded as proximately resulting from the service connected disability." Digest of Legal Opinions Relating to Veterans' Bureau, April 8, 1924, No. 8, pp. 1-2. On the other hand, it was held prior to the 1924 Act that where the veteran was "receiving treatment in a bureau hospital for a nonservice con-

[12] Veterans may qualify for Veterans Administration hospitalization, "irrespective of whether the disability, disease, or defect was due to service." Act of March 28, 1934, 48 Stat. 526, 38 U.S.C. 706.

nected disability, and as a result of such treatment received a permanent disability, such [permanent] disability is not service connected" and therefore not compensable. *Id.*, April 15, 1924, No. 8, p. 2; *Id.*, October 11, 1923, No. 2, p. 8.

With the enactment of Section 213 of the 1924 Act, hospital aggravation of a non-service-connected disability became compensable for the first time, within the limits of that provision. But compensation for hospitalization injuries incurred in the treatment of a service-connected disability could be made, as had been the case before Section 213, without regard to that Section's provisions or requirements. A Veterans Bureau General Counsel's opinion of March 20, 1928, involved a claim for compensation for an "ear disability [which] was actually the result of surgical treatment for service-connected disabilities." In approving payment, the opinion emphasized that the "additional compensation is payable for the ear condition in this case without resorting to the provisions of Section 213 for the reason that the said ear condition must be regarded as having been incurred while submitting to treatment for a service-connected disability." 51 Gen. Counsel Op. 191, unpublished opinion on file at Veterans Administration, and cited with approval in Decisions of the Administrator of Veterans' Affairs, No. 744, Vol. 1, Supp. 1, pp. 110, 112, May 8, 1947, and in Decision of the Administrator of Veterans' Affairs, No. 822, Vol. 1, Supp. 4, pp. 15, 16, August 30, 1949. Another General Counsel's opinion of October 31,

1929, also makes it plain that "If it be determined that the disability is due to an operation on account of a service connected disease or injury then the claimant's present disability may be rated without the aid of Section 213. * * * If it be determined that the claimant's present disability arose from an operation upon a non service connected injury or disease his present disability will have to be rated under Section 213." 60 Gen. Counsel Op. 366, unpublished opinion on file at Veterans Administration. Summarizing these views, a General Counsel's opinion, dated March 17, 1930, declares:

> These cases support the ruling laid down in the opinion of this Service in the instant case. This Service, therefore, adheres to its previous opinion that any disability flowing from an operation performed for the purpose of relieving a service connected disability, is also service connected as the proximate result of the injury or disease, and that in such cases it is not necessary to invoke the provisions of Section 213, supra, in order to grant service connection therefor [62 Gen. Counsel Op. 386, unpub. op. on file at Veterans Administration].

There being no need to rely on Section 213 to compensate hospital injuries arising in the course of treating service-connected disabilities, it was possible to continue to make compensation payments for such injuries during the period between March 20, 1933, when Section 213 was repealed, and March 28, 1934, when it was substantially re-en-

acted as Section 31 of the 1934 Act (*supra*, p. 29). For that reason, a September 21, 1933, opinion of the Veterans Administration Solicitor points out that, despite the repeal of Section 213, if a veteran was injured "as result of medical or surgical treatment awarded [him] for a service-connected disability, he will be entitled to continue to receive a pension on account of the disability so incurred." 10 Op. Sol. 230, unpublished opinion on file at Veterans Administration, and cited with approval in Decisions of the Administrator of Veterans' Affairs, No. 744, Vol. 1, Supp. 1, pp. 110, 112, May 8, 1947, and in Decisions of the Administrator of Veterans' Affairs, No. 822, Vol. 1, Supp. 4, pp. 15, 16, August 30, 1949.

Similarly, after Section 31 became law in 1934, a veteran's eligibility for increased benefits for the hospital aggravation of a service-connected condition was not conditioned on compliance with the requirements of Section 31. In other words, a veteran who is injured at a Veterans Administration hospital as a result of treatment of a service-connected condition does not, in order to be eligible for the additional benefits for that injury, have to show that the hospitalization injury resulted from negligence, malpractice, error in judgment, or accident (*supra*, p. 32). The facts in a 1947 Veterans Administrator decision are illustrative. After his discharge from the service, a veteran was admitted to a Veterans Administration hospital for treatment of service-connected hemorrhoids. A

spinal anesthetic administered incident to the hemorrhoidectomy resulted in the loss of use of the patient's legs. The Veterans Administration ruled that the loss of use of his legs must "be considered as having resulted from a disability incurred during World War II," so as to entitle the veteran to additional disability benefits resulting from the hospital treatment and to an automobile furnished to those World War veterans entitled to compensation for loss of use of a leg in World War II service. Decisions of the Administrator of Veterans' Affairs, No. 744, Vol. 1, Supp. 1, pp. 111, 112, May 8, 1947. These benefits were paid without reference to Section 31 and were based on the sole ground that the additional injuries resulting from hospitalization took place in the course of treatment of a service-connected condition. Another decision in 1949 shows that, without regard to Section 31, additional disability benefits may be paid for the aggravation of a service-connected injury caused by even a *private* physician's treatment of that service-connected condition. Decisions of the Administrator of Veterans' Affairs, No. 822, Vol. 1, Supp. 4, pp. 15, 16, August 30, 1949.

From these rulings it is clear that a hospital injury incurred in the course of treatment of a service-connected disability is compensable as a matter of course and without any regard for the provisions or requirements of Section 31. At the same time, these decisions make clear the all-inclusive and comprehensive nature of the administrative com-

pensation remedy available to respondent. For, even if the statutory prerequisites for payment of benefits under Section 31 of the 1934 Act (38 U.S.C. 501a) had not existed in this case,[13] payment for the additional disability resulting from the respondent's hospitalization for his service-connected condition would nevertheless have been made by the Veterans Administration.

Whether the monthly compensation benefits the respondent now receives are considered as payments under Section 31 or could be paid without regard to Section 31 is immaterial. In both cases, the extent of benefits is that provided in the detailed program developed by Congress for compensating veterans for service-incurred disability. To a brief review of the scope of the benefits under that program we now turn.

3. *Payments and other benefits currently available under the comprehensive statutory program.* The benefits currently available under the statutory system developed by Congress for compensating veterans and their dependents for injury or death in service compare, as this Court has noted, "extremely favorably with those provided by most workmen's compensation statutes." *Feres* v. *United States*, 340 U. S. 135, 145.[14] The principal bene-

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[13] That they did exist is plain from the record (R. 17).

[14] If respondent were allowed to recover under the Tort Claims Act, these compensation benefits would have to be deducted from his recovery (see *Brooks* v. *United States*, 337 U.S. 49, 53-54; *United States* v. *Brooks*, 176 F. 2d 482 (C.A. 4), and it is most unlikely that his ultimate recovery would be

fits under this scheme are, together with a vast number of other statutes conferring additional benefits on veterans, codified in Title 38, of the United States Code. In addition, Title 10 (Army), Title 34 (Navy), and Title 37 (Pay and Allowances of Army, Navy, Marine Corps, Coast Guard) contain many other statutes on military benefits and perquisites. The adequacy and inclusiveness of this statutory plan is shown by reference to but two of the more important provisions under which more than 2.4 billion dollars of compensation and pension benefits are paid annually. See *infra*, p. 49.

a. Monthly compensation payments are provided for veterans who have incurred partial or total disabling injuries during their period of military service (Act of March 20, 1933, Sec. 1(a), 48 Stat. 8, 38 U.S.C. 701(a); Act of July 13, 1943, 57 Stat. 554; Act of May 11, 1951, 65 Stat. 40, 38 U.S.C. 745). The amount of the disability compensation depends, of course, on the degree of disability and may be as high as $400 per month (Act of September 20, 1945, 59 Stat. 533, 534, amending Vet. Reg. 1 (a), part I, paragraph II (k); see 38 C.F.R. 3.236 (1952 Cum. Supp.)). In addition to these monthly compensation rates, a veteran with a disability of 50% or more is entitled to supplemental compensation payments, ranging from $14 to $91 each

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substantial enough to justify the burden and expense, both for him and the Government, of prolonged litigation in the courts. This is another reason why the fair, generous, and certain system of compensation benefits should be held to be the exclusive remedy. See *Feres* v. *United States*, 340 U. S. 135, 145.

month, based on the degree of disability and the number of dependents. Disability compensation continues to be paid until the veteran's death or until the disability has ceased. Where the disability is shown to have increased after a veteran's award of compensation has been made, commensurate increases in the pension will be made (Act of June 21, 1879, 21 Stat. 23, 30, as amended, 38 U.S.C. 57).

These service-incurred compensation provisions are fully applicable to the increased disability sustained by respondent at the Veterans Administration hospital, and he is now receiving compensation benefits of $103.95 per month from the Government for the increased disability on which his instant claim against the United States under the Federal Tort Claims Act is based. For the two year period since these payments took effect in July 1952, the $103.95 monthly payments received by respondent total practically $2,500.[15] Moreover, on the basis of his life expectancy, it is estimated that the total monthly compensation benefits to be paid by the Veterans Administration to respondent because of his hospital injuries will aggregate more than an additional $49,800.[16]

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[15] $2,494.80 is the product of 24 x $103.95, the portion of each monthly payment paid to respondent as compensation for his Veterans Administration hospital injuries from July 1, 1952 to July 1, 1954. See footnote 2, *supra*, p. 4.

[16] The $49,800 estimate is based on the receipt of $103.95 per month over an expected life span of 40 years for a 30-year-old man. Statistical Abstract of the United States, 1953 (H. Doc. No. 99, 83d Cong., 1st Sess.), Expectation of Life Table, p. 69. See footnotes 1 and 2 and 15, *supra*, pp. 4 40. Appendix B, *infra*, p. 54. The $42,000 estimate, referred to at page 8 of our petition for certiorari, failed to take into account the

b. Existing federal laws also provide for monthly compensation payments to the widow, children, and dependent mother and father of "any deceased person who died as the result of injury or disease incurred in or aggravated by active military or naval service" (Veterans' Regulation No. 1(a), part I, par. IV, Ch. 12A, 38 U.S.C. p. 5575; Act of March 20, 1933, Sec. 1(c), 48 Stat. 8, 38 U.S.C. 701(c); 38 C.F.R. 4.122, 4.124 (1952 Cum. Supp.)). A widow, with one child, may be awarded by the Veterans Administration the sum of $121 per month (38 C.F.R. 4.124 (1952 Cum. Supp.)). For each additional child, the widow is entitled to $29 per month *(id.)*. A dependent mother and father may be awarded an additional $60 per month *(id.)*.[17]

II

In Any Event, There Can Be No Recovery Under the Federal Tort Claims Act of Damages for a Veteran's Hospital Injury Arising Out of His Military Service

In Point I we have shown that there exists a comprehensive statutory system of benefits for in-

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statutory increase in compensation made effective July 1, 1952. Act of May 23, 1952, 66 Stat. 93, 38 U.S.C. 471a-5. See Appendix B, *infra*, p. 54. In this connection, it should also be noted that even the $49,800 estimate does not take into account the additional 5% increase which will be granted under H. R. 9020, 83d Cong., 2d Sess. That bill "has passed both Houses and is now before the President for signature." Appendix B, *infra*, p. 54. See 100 Cong. Rec. 13332 for table of increased veterans' benefits provided by H. R. 9020.

[17] For a collection of other federal statutes conferring special rights and benefits on veterans, and their dependents, see Kimbrough and Glen, *American Law of Veterans*. For a complete index and digest of benefits conferred by various state

ably with "aris[ing] out of or in the course of military duty", as well as its likening of the veterans' compensation benefits to workmen's compensation benefits (340 U. S. 135, 138, 143, 144, 145, 146), confirm the propriety of defining the term "arising out of or in the course of activity incident to service" in the same manner as "arising out of and in the course of employment" is understood and applied in the field of workmen's compensation.

Less than three months after equating veterans' and workmen's compensation benefits in *Feres*, this Court reiterated the settled principles underlying the test of "arising out of and in the course of employment" in workmen's compensation law. In *O'Leary* v. *Brown-Pacific-Maxon*, 340 U. S. 504, 506-507, the Court stated:

> The Longshoremen's and Harbor Workers' Act authorizes payment of compensation for "accidental injury or death arising out of and in the course of employment." § 2 (2), 44 Stat. 1425, 33 U.S.C. § 902 (2). * * * Workmen's compensation is not confined by common-law conceptions of scope of employment. *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U. S. 469, 481; *Matter of Waters* v. *Taylor Co.*, 218 N. Y. 248, 251, 112 N. E. 727, 728. *The test of recovery is not a causal relation between the nature of employment of the injured person and the accident. Thom* v. *Sinclair* [1917] A. C. 127, 142. *Nor is it necessary that the employee be engaged at the time of the injury in activity*

of benefit to his employer. All that is required is that the "obligations or conditions" of employment create the "zone of special danger" out of which the injury arose. Ibid. * * * [emphasis added].

In other words, "the basic thing" is that an incident of his employment places the claimant in a position where he is surrounded with conditions giving rise to the claim. *Hartford Accident & Indemnity Co.* v. *Cardillo,* 112 F. 2d 11, 14 (C.A. D.C.) (per Mr. Justice Rutledge), certiorari denied, 310 U. S. 649; see also *Leonbruno* v. *Champlain Silk Mills,* 229 N. Y. 470 (per Mr. Justice Cardozo).

That his military service surrounded respondent with the conditions giving rise to the instant claim cannot seriously be challenged. Obviously, it was only because he was in the service and had suffered a disability that he was eligible for admission to the Veterans Administration hospital at which he was injured. His former military service thus surrounded respondent with the precise conditions out of which the claim arose. The claim must therefore be viewed as having "arisen out of or in the course of activity incident to service." In the *O'Neil* case, *supra,* p. 19, Judge Edgerton, rejecting the veteran's claim for additional damages for the post-discharge hospital injuries there involved, observed (202 F. 2d 366, 367):

> Moreover, appellant's service led him to get treatment for his allergy in a government hos-

pital and the treatment he got there caused his disability. Accordingly it may be said that his disability did, though his allergy did not, "arise out of * * * activity incident to service."

The soundness of this conclusion is confirmed by the consistent holdings in workmen's compensation cases throughout the country that, where a work-connected injury is aggravated by negligent medical or surgical treatment, the additional disability resulting from that aggravation is considered as having arisen out of employment to the same extent as the original injury. It is, as one court has pointed out, "clearly the rule, sustained by the great weight of authority, that an injured workman is entitled to have included in any award made him under a workmen's compensation statute, any injury or disability which he may suffer as the result of aggravation, by way of malpractice, of the original injury." *Anderson* v. *Allison*, 12 Wash. 2d 487, 498-499; *Hoover* v. *Globe Indemnity Co.*, 202 N. C. 655; *Ducasse* v. *Walworth Manufacturing Co.*, 1 N. J. Super. 77; *Heaton* v. *Kerlan*, 27 Cal. 2d 716; *Mitchell* v. *Peaslee, Jr.*, 143 Me. 372; *Seaton* v. *United States Rubber Co.*, 223 Ind. 404; *Parchefsky* v. *Kroll Bros.*, 267 N. Y. 410; *Oleszek* v. *Ford Motor Co.*, 217 Mich. 318; *Vatalaro* v. *Thomas*, 262 Mass. 383. [18]

[18] For additional cases sustaining the proposition that "the great majority of American courts now hold that aggravation of the primary injury by medical or surgical treatment is compensable" under the workmen's compensation laws, see Larson, *Workmen's Compensation Law*, Vol. 1, p. 188.

The uniform holding of the cited cases removes any doubt that respondent's hospital injury in the instant case "arose out of or in the course of activity incident to service." The Veterans Administration itself, as we have already pointed out, has adhered to the same view and has repeatedly held "that an additional disability resulting from [medical or surgical] treatment of a directly service-connected disability is to be considered as the proximate result of the service-connected condition and hence adjudicated on the basis that the resultant disability is an aggravation or acceleration of the original condition." Decisions of the Administrator of Veterans' Affairs, No. 744, Vol. 1, Supp. 1, pp. 110, 112, May 8, 1947; see *supra*, pp. 34-37. Indeed, the express language of Section 31 of the 1934 Act, 38 U.S.C. 501a (*supra*, pp. 2-3) shows that a Veterans Administration hospital aggravation of even a non-service-connected injury must be deemed to be service-connected and for that reason must be compensated "in the same manner" as if such aggravation "were service connected." See *Pettis* v. *United States*, 108 F. Supp. 500, 501 (N.D. Cal.). Respondent's action under the Federal Tort Claims Act is accordingly barred, even if his contention that the bar is operative only where the claim arises out of service-incident injuries is accepted.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed.

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AUGUST 1954

APPENDIX A

Summary of Veterans' Laws

The most recent compilation of "Laws Relating to Veterans," [19] sets forth the text of over 650 federal statutes enacted from 1914 to 1951. Over 300 of these laws, as noted by the President in his most recent budget message to Congress, "provide a variety of special benefits and services" to veterans and their dependents (H. Doc. 264, 83d Cong., 2d Sess., p. M 50). Compensation and pension payments paid by the Veterans Administration under these laws amounted in the 1953 fiscal year to more than 2.4 billion dollars (*id.* at p. M 51). For the present fiscal year "expenditures of 2.5 billion dollars" are estimated for "compensation and pension benefits" (*id.* at p. M. 52; see also Annual Report of the Administrator of Veterans' Affairs (1952) pp. 186, 203). Current congressional concern for providing an adequate and specialized system of compensation for service-incurred injury or death is further evidenced by the introduction during the fiscal year 1953 of approximately 1,300 bills pertaining to veterans' benefits. [20] This special interest of Congress in veterans' affairs is not, however, a recent phenomenon of the Korean conflict or of World War II but began in the earliest days of our Government.

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[19] Compiled by Superintendent, Document Room, House of Representatives, 1951, 2 vols.

[20] Annual Report of the Administrator of Veterans' Affairs, 1953, p. 110.

The need and desirability of providing specially for disabled Revolutionary Army veterans was stressed early in 1776.[21] Shortly thereafter, the Continental Congress adopted the first national pension law in the United States.[22] This was followed by a long series of other enactments for Revolutionary War veterans and their dependents.[23] The expansion of the military forces as a result of the War of 1812 and the Mexican War was accom-

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[21] Even before the Revolutionary War, the payment of pensions to injured soldiers was a well-established colonial practice. As early as 1624, the Virginia General Assembly passed laws making special provision for "those that shall be hurt upon service," 1 Hening, Stat. at Large for Virginia, 128. Other examples of pension legislation under the Colonial Laws of Massachusetts, Maryland, New York, and Rhode Island are collected in Glasson, *Federal Military Pensions in the United States*, pp. 14-17; see also *Brief History of Legislation Pertaining to Veterans' Benefits*, 38 U.S.C.A., pp. xxvii, xxviii.

[22] Ford, *Journals of the Continental Congress*, vol. 5, pp. 469, 702-705. This Act (Act of August 26, 1776), which was to be administered through the various states, authorized half pay to veterans who had been totally disabled while in the service of the United States. Proportionate relief was authorized for the partially disabled.

[23] Act of September 25, 1778 (*id.*, vol. 12, p. 953); Act of April 23, 1782 (*id.*, vol. 22, p. 210); Act of September 29, 1789, 1st Cong., 1st Sess., 1 Stat. 95; Act of March 23, 1792, 1 Stat. 243; Act of February 28, 1793, 1 Stat. 324; Act of April 25, 1808, 2 Stat. 491. In 1816, an increase in pension rates was suggested, in order to reflect the increased cost of living and to allow veterans to support themselves "plentifully and comfortably." House Report, Committee on Pensions and Revolutionary Claims, American State Papers, Claims, 473-474. The Act of April 24, 1816, 3 Stat. 296, was passed to meet this need. Still additional provisions for veterans were sought in President Monroe's message to Congress in December, 1817. 31 Annals of Congress, 15th Cong., 1st Sess., 1817-1818, vol. 1, p. 19. See also, Act of June 7, 1832, 4 Stat. 529; Act of July 4, 1836, 5 Stat. 127; Act of March 9, 1878, 20 Stat. 27.

panied, as had been true after the Revolutionary War, by the passage of numerous other statutes for compensating injured veterans of those wars.[24] Still additional statutes were passed to compensate veterans of the Civil War and their dependents.[25] And, within six months after the United States entered World War I, the President approved a law establishing a detailed and complete compensation system for those who served in that war, as well as for their dependents.[26] The World War Veterans Act of June 7, 1924 (43 Stat. 607, 38 U.S.C. 421) later consolidated and revised the laws affecting the various benefits available to veterans of World War I and their dependents. Section 213 of the 1924 Act, as noted in the body of the

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[24] Act of April 24, 1816, 3 Stat. 296-297; Act of February 14, 1871, 16 Stat. 411; Act of March 9, 1878, 20 Stat. 27; Act of March 19, 1886, 24 Stat. 5; Act of September 8, 1916, 39 Stat. 844; Act of May 13, 1846, 9 Stat. 9; Act of June 3, 1858, 11 Stat. 309; Sec. 3, Act of July 25, 1886, 14 Stat. 230; Sec. 13, Act of July 27, 1868, 15 Stat. 237; Sec. 18, Act of March 3, 1873, 17 Stat. 572; Act of January 29, 1887, 24 Stat. 371; Act of February 6, 1907, 34 Stat. 879; Act of May 11, 1912, 37 Stat. 112.

[25] Act of July 22, 1861, 12 Stat. 268, 270; Act of July 4, 1864, 13 Stat. 387; Act of June 8, 1872, 17 Stat. 335; Act of March 3, 1865, 13 Stat. 499; Act of June 6, 1866, 14 Stat. 56, 58; Act of March 19, 1886, 24 Stat. 5; Act of April 19, 1908, 35 Stat. 64; Act of June 27, 1890, 26 Stat. 182; Act of April 24, 1906, 34 Stat. 133; Act of March 4, 1907, 34 Stat. 1406; Act of May 11, 1912, 37 Stat. 112.

[26] Act of October 6, 1917, 40 Stat. 398; Act of June 27, 1918, 40 Stat. 617; Act of July 11, 1919, 41 Stat. 158; Act of March 3, 1919, 40 Stat. 1302; Act of August 9, 1921, 42 Stat. 147, 150; Act of April 20, 1922, 42 Stat. 496; Act of May 11, 1922, 42 Stat. 507; Act of July 1, 1922, 42 Stat. 818; Act of June 5, 1924, 43 Stat. 389; Act of December 18, 1922, 42 Stat. 1064; Act of March 4, 1923, 42 Stat. 1521.

brief, expressly authorized compensation for hospitalization injuries.[27] *Supra*, pp. 27-28.

On March 20, 1933, Congress repealed all prior laws granting compensation and other allowances to veterans and their dependents, laid down broad principles for the granting of pensions and other benefits, and gave the President the authority to prescribe by regulation the administrative details (48 Stat. 8, 38 U.S.C. 701). This is the basic law under which payments are now made to veterans and their dependents for World War II service-incurred disability and death. See Veterans' Regulations, 38 U.S.C.A., Chapter 12A. It is also the basic law under which veterans of the Korean conflict are receiving compensation for injury or death suffered during the period of hostilities in Korea (Act of May 11, 1951, 65 Stat. 40, 38 U.S.C. 745).

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[27] The 1924 Act also provided compensation for service-incurred death and disability (43 Stat. 615, 38 U.S.C. 471), for burial allowances (43 Stat. 616, 38 U.S.C. 472), for medical, surgical, and dental treatment in addition to compensation (43 Stat. 618, 38 U.S.C. 479), generous life insurance protection (43 Stat. 624, 38 U.S.C. 511), and a complete program for vocational rehabilitation of the disabled serviceman (43 Stat. 627, 38 U.S.C. 531). Compensation rates for specific disabilities were again increased by the Act of May 5, 1926 (44 Stat. 396) and the Act of February 11, 1927 (44 Stat. 1085).

APPENDIX B

LETTER FROM THE VETERANS' ADMINISTRATION

VETERANS ADMINISTRATION
Washington 25, D. C.
August 16, 1954

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The Honorable Simon E. Sobeloff
The Solicitor General
Department of Justice
Washington 25, D. C.

Re: United States v. Peter Brown
38 October Term 1954
Supreme Court

DEAR MR. SOLICITOR GENERAL:

The purpose of this letter is to furnish specific information, as requested by the Department, concerning the rates of disability compensation paid to the plaintiff before and after the occurrence of the injury alleged in his complaint.

Prior to entry into the Veterans Administration Hospital, Bronx, New York, on October 1, 1951 Mr. Brown was receiving $15.00 monthly as disability compensation from the Veterans Administration on the basis of a service-connected rating of 10% disability. Subsequent to his discharge from the hospital and effective April 22, 1952 Mr. Brown was rated as having a combined disability rating of 70% and was awarded $119.70 monthly compensation. Effective July 1, 1952 the $119.70

monthly payment was increased to $135.45. 66 Stat. 93, 38 U.S.C. 471 a-5.

Of the $119.70 monthly payment received by Mr. Brown from April 22, 1952 to July 1, 1952, $89.70 per month was paid for and is allocable to the injury sustained by him at the Veterans Administration Hospital and for which injuries his suit under the Federal Tort Claims Act was instituted. Of the $135.45 monthly payment received by Mr. Brown since July 1, 1952 $103.95 represents the portion allocable to his hospital injuries.

To facilitate your computation as to the value of prospective monthly payments to be paid Mr. Brown, I want to point out that he reached his 30th birthday on June 6, 1954. In this connection I also want to point out that under H. R. 9020, which has passed both houses and is now before the President for signature, Mr. Brown's $135.45 monthly payment will be increased to $141.70 of which $108.70 will be paid for his hospitalization injuries.

Very truly yours,

[S] EDWARD E. ODOM,
General Counsel.

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IN THE

Supreme Court of the United States

October Term, 1953

No. 638

UNITED STATES OF AMERICA,

Petitioner,

v.

PETER BROWN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MEMORANDUM FOR RESPONDENT.

THE REPORTER COMPANY, INC., New York City—1954

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CITATIONS.

In the

Supreme Court of the United States

October Term, 1953

No. 654

United States of America,
Petitioner,
v.
Peter Brown.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

MEMORANDUM FOR RESPONDENT.

Opinions Below.

The memorandum opinion of the United States District Court for the Southern District of New York (R. 22) is not reported. The opinion of the United States Court of Appeals for the Second Circuit (R. 29-31) is reported at 209 F. 2d 463.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented.

Whether a discharged serviceman, who receives treatment at a Veterans' Administration Hospital, may sue the

United States of America under the Federal Tort Claims Act for injuries sustained by him as a result of the negligence of hospital employees.

Statutes Involved.

The Federal Tort Claims Act, 28 U. S. C. 1346(b), and Section 31, Act of March 28th, 1934, 48 Stat. 526, 38 U. S. C. 501a, are set forth in the petition at pages 2-3.

In addition, the Federal Tort Claims Act provides:

> (28 U. S. C. A. 2674). The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages * * *.
>
> (28 U. S. C. A. 2680). Exceptions.
>
> The provisions of this chapter and Section 1346(b) of this title shall not apply to:
>
> (a) Any claim based upon an act or omission, of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
>
> (b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.
>
> (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from the injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Railroad Company. June 25, 1948, c. 646, 62 Stat. 984, amended July 16, 1949, c. 340, 63 Stat. 444.

Statement.

This is an action brought under the Federal Tort Claims Act to recover for personal injuries sustained by the respondent when he was a patient at a Veterans Administration Hospital.

The respondent had served in the Army Air Force from October 27, 1942, to August 6, 1944. He was honorably discharged on the latter date with a service connected disability, having been injured in the left knee during military operations in New Guinea. Upon his discharge, he was able to walk, but upon any sudden or any strenuous movements, his left leg would become dislocated. Six years later, on March 8, 1950, he was operated upon by the Veterans Administration for the purpose of "cleaning up" the knee joint. His leg continued to dislocate frequently, however.

Pursuant to his status as a veteran, the respondent was admitted to the Veterans Administration Hospital at 130 Kingsbridge Road, Bronx, New York, on October 1, 1951, for examination and possible treatment. It was decided at that time that another operation should be performed on his left knee for the purpose of preventing the leg from dislocating. The operation was performed on October 4, 1951. It was to be a so-called bloodless operation, requiring the application of a tourniquet on the left thigh. The tourniquet was applied by an operating room attendant in the employ of the Veterans Administration. The tourniquet was defective in that the pressure gauge was not registering and an excessive amount of pressure was applied to the respondent's leg. The attendant should have realized that the tourniquet was defective as soon as it was applied, but he did not.

As a result of the excessive pressure, the nerves in the respondent's leg were seriously and permanently injured. The respondent was confined to the hospital for approximately sixteen weeks thereafter, and for a long period after that was required to report to the hospital each day for treatment. He lost all sensitivity in portions of his left leg below the knee, and he has lost control of some of the muscles in that portion of the leg. He is unable to walk without an orthopedic brace and at this time it appears that he will never regain the full use of his leg.

The respondent received a pension from the Government upon his discharge. This pension was increased as a result of the injury he sustained in the Veterans Administration Hospital in 1951.

The respondent filed his complaint against the United States under the Federal Tort Claims Act, on April 14, 1952, in the United States District Court for the Southern District of New York. After answering, the United States moved to dismiss the complaint, "for failure to state a claim upon which relief can be granted."

The District Court granted the motion, noting that there was a square conflict of authority between the circuit courts on the pertinent question.

The respondent herein appealed to the Court of Appeals for the Second Circuit, and that Court reversed.

Reasons for Not Opposing the Petition.

Basically, the principal question herein is one of statutory construction. The question is whether the Federal Tort Claims Act, as written, and as interpreted by this Court, provides a remedy for a discharged veteran who is injured, through negligence, at a Veterans Administration Hospital. There is a clear conflict on this question. *Santana v. United States* (1st Circuit, 1949), 175

Fed. 2d 320, and *Bandy v. United States* (D. C. Nevada, 1950), 92 Fed. Supp. 360, as well as the decision below in the instant case allow such recovery. *O'Neil v. United States* (D. C. Circuit, 1953), 202 Fed. 2d 366 and *Pettis v. United States* (D. C. Calif., 1952), 108 Fed. Sup. 500, hold that such a recovery may not be had.

The present conflict is due, in large part, to a difference of opinion among the Courts as to what this Court held in *Feres v. United States* (1950), 340 U. S. 135. Thus, the United States claims in the petition that the *Feres* decision is of general applicability, holding that the existence of an administrative compensation system bars an action for additional damages under the Federal Tort Claims Act by anyone who has received Veterans Compensation.

The Circuit Court below, rejected this view of the *Feres* case. The Court below held that the *Feres* decision only barred an action under the act to a claimant who was a serviceman on active duty and not on furlough when the tort occurred.

Thus, the question is one which should be determined by this Court. The respondent would prefer to have such a determination before incurring the expense and difficulties necessarily attendant to proceeding to trial.

CONCLUSION.

For the reasons set forth above, the respondent does not oppose the petition.

Respectfully submitted,

LEE S. KREINDLER,
Counsel for Respondent.

March, 1954.

Supreme Court of the United States

October Term, 1954

No. 38

UNITED STATES OF AMERICA,

Petitioner,

—v.—

PETER BROWN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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September 17, 1954

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No. 38

UNITED STATES OF AMERICA,

Petitioner,

—v.—

PETER BROWN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

Opinions Below

The opinions below are adequately set forth in the brief for the United States.

Jurisdiction

The jurisdictional requisites are adequately set forth in the brief for the United States.

Statutes Involved

The Federal Tort Claims Act, 28 U. S. C. 1346(b), and Section 31, Act of March 28th, 1934, 48 Stat. 526, 38 U. S. C. 501a, are set forth in the Petitioner's Brief at pages 2-3.

In addition, the Federal Tort Claims Act provides:

> (28 U. S. C. A. 2674). The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages * * *.
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> (28 U. S. C. A. 2680). Exceptions.
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> The provisions of this chapter and Section 1346(b) of this title shall not apply to:
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> (a) Any claim based upon an act or omission, of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
>
> (b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.
>
> (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.
>
> (d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from the injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Railroad Company. June 25, 1948, c. 646, 62 Stat. 984, amended July 16, 1949, c. 340, 63 Stat. 444.

Question Presented

Whether a discharged veteran, not subject in any way to military discipline, who receives treatment at a Veterans Administration hospital, may maintain an action against the United States under the Federal Tort Claims Act for injuries sustained by him as a result of the negligence of Government employees.

Statement

This is an action brought under the Federal Tort Claims Act to recover for personal injuries sustained by the respondent when he was a patient at a Veterans Administration Hospital.

The respondent had served in the Army Air Force from October 27, 1942, to August 6, 1944. He was honorably discharged on the latter date with a service connected disability, having been injured in his left knee. Upon his discharge, he was able to walk, but upon any sudden or strenuous movements, his left leg would become dislocated. Six years later, on March 8, 1950, he was operated upon by the Veterans Administration for the purpose of "cleaning up" the knee joint. His leg continued to dislocate frequently, however (R. 7, 8).

Pursuant to his status as a veteran, the respondent was admitted to the Veterans Administration Hospital at 130 Kingsbridge Road, Bronx, New York, on October 1, 1951, for examination and possible treatment. It was decided at that time that another operation should be performed on his left knee for the purpose of preventing the leg

from dislocating. The operation was performed on October 4, 1951. It was to be a "bloodless" operation, requiring the application of a tourniquet on the left thigh. The tourniquet was applied by an operating room attendant in the employ of the Veterans Administration. The tourniquet was defective in that the pressure gauge was not registering and an excessive amount of pressure was applied to the respondent's leg. The attendant should have realized that the tourniquet was defective as soon as it was applied, but he did not (R. 8).

As a result of the excessive pressure, the nerves in the respondent's leg were seriously and permanently injured. The respondent was confined to the hospital for approximately sixteen weeks thereafter, and for a long period after that was required to report to the hospital each day for treatment. He lost all sensitivity in portions of his left leg below the knee, and he has lost control of some of the muscles in that portion of the leg. He is unable to walk without an orthopedic brace and it appears that he will never regain the full use of his leg (R. 8).

The respondent received a pension from the Government upon his discharge. This pension was increased as a result of the injury he sustained in the Veterans Administration Hospital in 1951 (R. 5).

The respondent filed his complaint against the United States under the Federal Tort Claims Act, on April 14, 1952, in the United States District Court for the Southern District of New York. After answering, the United States moved to dismiss the complaint, "for failure to state a claim upon which relief can be granted" (R. 1, 2, 3, 6).

The District Court granted the motion, noting that there was a square conflict of authority between the circuit courts on the pertinent question (R. 13).

The respondent herein appealed to the Court of Appeals for the Second Circuit, and that Court reversed (R. 16-19).

Summary of Argument

I.

The respondent has brought this action under the Federal Tort Claims Act for injuries that he sustained at the hands of Veterans Administration employees. Whether or not he can recover is a question of statutory construction. Both the language and the history of the Federal Tort Claims Act provide overwhelming evidence that Congress intended the Act to apply to the respondent's claim.

The language of the Act is general in scope, allowing a recovery "for personal injury or death caused by the negligence or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment * * *" 28 U. S. C. 1346(b). The act itself contains twelve exceptions, none of which affect respondent's claim.

The history of the Tort Claims Act is further convincing proof that Congress did not intend to exclude respondent's claim from its applicability. The Tort Claims Act was passed in 1946, at a time when Congress was unquestionably cognizant of the rights and remedies of veterans. Had Congress intended to exclude from the Act a claim by a discharged veteran who was injured through the negligence

of a Veterans Administration hospital employee it would have done so in the Act itself. A specific exception, excluding from the provisions of the Act recipients of veterans compensation was deliberately stricken from the Federal Tort Claims Act when it was enacted into law.

This court, in *Brooks* v. *United States*, 337 U. S. 49, made it clear that the receipt of veterans compensation did not constitute a bar to the bringing of an action under the Tort Claims Act. The court allowed a recovery to a serviceman who was injured by a Government truck while he was on furlough. The court said that "were the accident incident to the Brooks' service, a wholly different case would be presented." 337 U. S. 49, 52.

This "wholly different case" came to the court in the three cases decided in *Feres* v. *United States*, 340 U. S. 135. The *Feres* cases all involved claimants who had been injured while on active duty and not on furlough, and whose injuries had been due to the negligence of others in the Armed Forces.

This court denied a recovery under the Tort Claims Act, in the *Feres* cases (1) because such a recovery would be an invitation to the subversion of military discipline, a result that Congress clearly did not intend "in the absence of express Congressional command", (2) because of the non-existence of private liability comparable to that of an Army to its soldiers, and (3) the "distinctively federal" relationship between the Government and members of the Armed Forces, which necessarily negated the existence of liability dependent on local law.

That the *Feres* decision was not based on the alleged exclusiveness of the compensation remedy was made clear

by the conclusion of the Court, as stated in the last paragraph of the *Feres* opinion, and by the specific reaffirmation of *Brooks* decision, which had held that compensation was not the exclusive remedy. The Court, by way of dictum, did say that it was *desirable* to construe the Federal Tort Claims Act, "so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." 340 U. S. 135, 139. This was not, however, the holding of the case. The Court said nothing else in the *Feres* opinion that can possibly be construed as holding that the Veterans Compensation Statutes constitute an exclusive remedy.

In addition to the specific reaffirmation of the *Brooks* decision, and the bases of its decision clearly stated in the last paragraph, the argument before the Court in *Feres* provides more evidence that *Feres* was not based upon the exclusiveness of the compensation remedy. Briefs filed by the United States in the three *Feres* cases did not even make such an argument.

Similarly, subsequent decisions of this Court do not indicate that *Feres* was based on that ground. The decisions, relied upon by the Government herein, construe *Feres* as applying to soldiers on active duty, and specifically reaffirm the Court's decision in *Brooks* v. *United States*, *supra*, which held compensation *not* to be exclusive.

The *Feres* and *Brooks* decisions are consistent and complementary. They establish clear law. Under them a claimant who was injured while on active duty and not on furlough, due to the negligence of another member of the

Armed Forces may not recover under the Tort Claims Act. Such a recovery, as pointed out by *Feres*, would violate the words of the Act referring to private liability and local law.

The respondent does not come within the *Feres* limitation on the applicability of the Tort Claims Act. His case is a stronger one for recovery than the *Brooks* case itself.

The respondent, at the time of his injury, was a discharged veteran, not subject in any way to military discipline. His claim against the Government is one which would be cognizable under local law if the Government were a private party. The basic elements motivating the Court's opinion in the *Feres* case do not exist in the case at bar.

II.

The United States claims that even if the Court should hold that receipt of Veterans Compensation does not constitute a bar to an action under the Tort Claims Act, Brown's claim is barred by the fact that his injury arose out of and was incident to his service. This we vigorously deny.

The term "incident to service" used by this Court in the *Brooks* and *Feres* opinions must be interpreted in the way the Court intended in those opinions. The Court made it clear that the term, "incident to service" referred to a situation where a "claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the Armed Forces * * *." *Feres* v. *United States*, 340 U. S. 135, 138. It is in such a situation that the unique

conditions of military service and discipline are involved, and it is from such a situation that a claim will be denied under the Tort Claims Act.

Respondent's claim does not arise from such a situation. As a discharged veteran he was in no way on active duty or subject to military discipline. The injury that he suffered at the hands of Veterans Administration employees was a new and different injury from any that he had had before. His injury was not caused by his service "except in the sense that all human events depend upon what has already transpired." *Brooks* v. *United States*, 337 U. S. 49, 52.

Any strained similarity between the phrase "arising out of or in the course of activity incident to service," used by this Court, and the phrase "arising out of and in the course of employment" in Workmens Compensation Law is irrelevant to the question of what this Court intended in the *Brooks* and *Feres* cases.

Denial of Brown's claim on the ground that in a remote way it arose from activity "incident to service" would do more than ignore the basic considerations involved in *Brooks* and *Feres*. It would mean gross inequity and confusion in the law.

I. The Respondent Has a Remedy Under the Federal Tort Claims Act Which Is Not Barred by the Existence or Receipt of Benefits Under the Compensation Statutes.

A. The language and history of the Tort Claims Act indicate that Congress intended the Act to apply to Brown's claim.

The Federal Tort Claims Act, under which the respondent is proceeding, permits actions to be started against the United States for the negligence of Government employees. Its language is general in scope. It provides (28 U. S. C. A. 2680) for twelve specific exceptions. Respondent's action does not fall within any one of these exceptions or a combination of any of them.

As this Court recognized in *Brooks* v. *United States* (1949), 337 U. S. 49, 51, 53, the Act was passed in 1946, at a time when Congress was unquestionably cognizant of the rights and remedies of veterans. If Congress had intended to exclude from its application an action such as the one at bar, it would have written into the Act such an exception.

This Court has stated the rule on many occasions:

> The section contains its own specific provisos and limitations, and these, on familiar principles, strongly tend to negative any other and implied exception. (*Lapina* v. *Williams*, Commissioner, 232 U. S. 78, 92.)

> The implication is that any proceeding not covered by the exception is to be subject to the rule. (*Moore Ice Cream Co.* v. *Rose*, Collector of Revenue, 289 U. S. 373, 377.)

> These special exceptions exclude any other. (*Wood* v. *A. Wilberts' Lumber Co.*, 226 U. S. 384, 390.)

See also *Cunard Steamship Co.* v. *Millen, Secretary of the Treasury*, 226 U. S. 100, 128 and *Equitable Life Assurance Society* v. *Pettus*, 140 U. S. 226, 233.

Furthermore, the exceptions that were written into the Act (excluding, for example, claims arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war, and claims arising in a foreign country) make it clear that Congress was aware of the present problem when it enacted the Tort Claims Act. This, also, was recognized by the Court in *Brooks* v. *United States*, 337 U. S. 49, 51.

Thus, if the Act is to be accepted as it was written, respondent has a clear right thereunder. This Court has said:

> It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the Act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the Courts is to enforce it according to its terms. (*Caminetti* v. *United States*, 242 U. S. 470, 485; *Mackenzie* v. *Hare*, 239 U. S. 299, 309; *Adams Express Company* v. *Kentucky*, 238 U. S. 190, 199.)

Furthermore, as this Court has pointed out (*Brooks* v. *United States*, 337 U. S. 49, 51-52) when the present Tort Claims Act was first introduced (H. R. 181, 79th Cong., 1st Sess.), it contained the following specific exception:

> (8) Any claim for which compensation is provided by the Federal Employees' Compensation Act, as

> amended, or by the World War Veterans' Act of 1924, as amended.

This exception, had it been retained in the Act would have barred the instant claim. The World War Veterans Act of June 7, 1924, 43 Stat. 607, 38 U. S. C. 421, as amended, is the statute under which respondent has received compensation payments for his hospital-caused injury. This fact is specifically recognized by petitioner at page 31 of its brief.

The exception, however, was dropped from the Tort Claims bill (H. R. 181) when H. R. 181 was incorporated into the Legislative Reorganization Act and enacted into law. In words strikingly pertinent to the case at bar, Judge Parker, Chief Judge of the Court of Appeals for the Fourth Circuit stated:

> This exception was omitted from the Tort Claims Act when the others were written in as Section 421. In my opinion, the Court is without power to write back into an act by interpretation a section which Congress has thus deliberately omitted. The only excuse for reading in an exception by interpretation is that Congress must be presumed to have intended that an exception apply; but Congress could not be presumed to intend that an exception apply, when it deliberately struck the exception from the Act upon its passage. (Dissenting opinion, *United States* v. *Brooks*, 169 Fed. 2d 840, 849.)

Judge Parker's dissent was expressly and specifically approved by this Court when it reversed the decision of the Court of Appeals, *Brooks* v. *United States*, 337 U. S. 49, 51. It follows that this Court can not hold in favor of

the United States in the instant case unless it reverses its own decision in the *Brooks* case and reads into the Tort Claims Act an exception that Congress deliberately struck out.

B. The Brooks decision makes it clear that veterans' compensation is not the exclusive remedy.

This Court has specifically ruled that the receipt of veterans' compensation does not constitute a bar to an action under the Federal Tort Claims Act. *Brooks* v. *United States*, 337 U. S. 49, 53.

In the *Brooks* case, the plaintiff was a member of the Armed Forces on furlough. While driving along the highway, a Government owned vehicle collided with him, and Brooks was injured. Brooks received a pension under the compensation statutes. Despite this, he brought an action under the Tort Claims Act. The Government contended that there was no liability under the Tort Claims Act inasmuch as Brooks had been in the Army and the Compensation Act was a bar to a recovery by him under the Tort Claims Act. This Court rejected that contention, holding that veterans' compensation was not an exclusive remedy and that receipt of compensation did not constitute a bar to an action under the Tort Claims Act. The Court said, at page 50:

> The question is whether members of the United States Armed Forces can recover under the Act (Tort Claims Act) for injuries not incident to their service.

Page 51:

> The statutes and terms are clear. They provide for District Court jurisdiction over any claim

> founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen'. The statute does contain twelve exceptions. None exclude petitioner's claims.

Page 53:

> Provisions in other statutes for disability payments to servicemen, and gratuity payments to their survivors, 38 U. S. C. 701, indicate no purpose to forbid tort actions under the Tort Claims Act. Unlike the usual Workmen's Compensation Statute, e.g., 33 U. S. C. 905, there is nothing in the Tort Claims Act or the Veterans Laws which provides for exclusiveness of remedy * * *. In the very act we are construing, Congress provided for the exclusiveness of the remedy in three instances, numbers 403(d), 410(b) and 423 (now 28 U. S. C. A. 1346, 2672, 2679), and omitted any provision which would govern this case.

Thus the Supreme Court made it absolutely clear (1) that the Tort Claims Act was of general applicability, (2) that the Veterans Laws are not exclusive remedies, and that (3) even a serviceman may sue the Government under the Tort Claims Act provided his injury did not result from a service-connected activity.

C. The Feres limitation on the applicability of the Tort Claims Act does not extend to the case at bar.

1. *The Feres holding applies only to servicemen on active duty. It is based on factors not present in Brown's claim.*

a. The facts in the Feres cases.

The petitioner herein relies most heavily on *Feres* v. *United States* (1950), 340 U. S. 135. Petitioner argues (page 15, brief for the United States) that the holding in *Feres* is based on the "exclusiveness of the compensation remedy."

Petitioner's position is not supported by the facts in the *Feres* case or by this Court's opinion therein.

The *Feres* case actually involved three cases joined on appeal, *Feres* v. *United States*, 340 U. S. 135, 136, 137. In the *Feres* case itself, "Decedent perished by fire in the barracks at Pine Camp, New York, while on active duty in service of the United States. Negligence was alleged in quartering him in barracks known or which should have been known to be unsafe because of a defective heating plant and in failing to maintain an adequate fire watch."

In *Jefferson* v. *United States*, the second of the three cases, "Plaintiff, while in the Army, was required to undergo an abdominal operation. About eight months later, in the course of another operation after plaintiff was discharged, a towel thirty inches long by eighteen inches wide, marked 'Medical Department U.S. Army' was discovered and removed from his stomach. The complaint alleged that it was negligently left there by the Army surgeon."

In *Griggs* v. *United States*, the third of the three cases, the complaint "alleged that while on active duty he (the

deceased) met death because of negligent and unskiliful medical treatment by Army surgeons."

All three of these cases concerned injuries caused to servicemen on active duty. The Court said, at page 138:

> The common fact underlying the three cases is that each claimant, while on active duty and not on furlough sustained injury due to negligence of others in the Armed Forces.

The Court stated its holding in the last paragraph of its opinion, at page 146:

> We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command. Accordingly, the judgments in the *Feres* and *Jefferson* cases are affirmed and that in the *Griggs* case is reversed.

b. The non-existence of comparable private liability.

The *Feres* decision was in no sense based upon the alleged exclusiveness of the compensation remedy. Rather, it was based on the fact that those injured therein were *in* the Armed Services *on active duty* when the torts occurred. As to such claimants there was no liability under the Tort Claims Act because of (1) the non-existence of private lia-

bility comparable to the alleged liability of an army to its soldiers; (2) the "distinctively federal" relationship between the Government and members of the Armed Forces, which necessarily negated the existence of liability dependent on local law; and (3) the fact that such recovery would be an invitation to the subversion of military discipline, a result that Congress clearly did not intend "in the absence of express congressional command."

The Tort Claims Act provides that "The United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances * * *". 28 U. S. C. Section 2674. The Court found this language to be a clear indication that Congress did not intend the Act to cover injuries to members of the Armed Forces on active duty and not on furlough, *Feres v. United States*, 340 U. S. 135, 141, 142, since there was no private liability comparable to that of an Army to its soldiers.

c. The "distinctively federal" relationship between the Government and members of the Armed Forces.

The Tort Claims Act further provides that, "The law of the place where the act or omission occurred" shall govern consequent liability. 28 U. S. C. Sect. 1346(b).

In the *Feres* opinion, this Court said, at pages 143-144:

> The relationship between the Government and members of its armed forces is 'distinctively federal in character,' as this Court recognized in *United States* v. *Standard Oil Co.*, 332 U. S. 301, wherein the Government unsuccessfully sought to recover for losses incurred by virtue of injuries to a soldier. The considerations which lead to that decision apply with even greater force to this case:

> ' * * * To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority. See Tarble's Case, 13 Wall. 397; Kurtz v. Moffitt, 115 U. S. 487 * * * ' pp. 305-306.

Thus the Court held that Congress, in providing that local law shall be determinative, made clear its intention not to have the Act cover injuries to servicemen on active duty.

d. Subversion of military discipline.

Running through the entire *Feres* opinion is a consciousness on the part of the Court of the possible subversion of military discipline that would result from allowing claims, under the Tort Claims Act, by servicemen on active duty for torts committed by others in the Armed Services.

Thus, the Court says, at page 141, "We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving." And, in distinguishing the *Brooks'* case, in which the Court allowed a recovery, the Court stated, at page 146, that "Brooks' relationship while on leave was not analogous to that of a soldier injured while performing duties under orders."

It is also significant that in the briefs and argument before this Court in the *Feres* cases, the United States placed primary emphasis on the subversion of military discipline that would result from allowing the *Feres* claims. The government's brief in *United States* v. *Griggs*, No. 31,

Supreme Court, October Term, 1950, sets forth the government's argument as presented in the *Feres, Jefferson,* and *Griggs* cases. The index to this brief displays the following argument headings:

> II. A. Allowing suits on service caused injury or death claims would lead to consequences which Congress should not be presumed to have intended.
>
> 2. It would subject service-caused injury and death claims to judicial scrutiny and thereby impair military discipline.

In advancing this argument the brief of the United States quoted the following language from *United States* v. *Brooks,* 169 Fed. 2d 840, 845, which emphasized:

> * * * the unfortunate results, including the subversion of military discipline, if soldiers could sue the United States for injuries incurred by reason of their being in the Armed Service of their country. If soldiers could sue for such injuries as illness based on the alleged negligence of the company cook or mess sergeant, or if soldiers who contract sickness on wintry sentry duty had a right of action against the government on the allegation of a negligent order given by the Company Commander, then the traditional grousing of the American soldier would result in the devastation of military discipline and morale.

This Court had also displayed its concern with the possible problem of subversion of military discipline in *Brooks* v. *United States, supra.* The Court said, at 337 U. S. 49, 52:

> The government envisages dire consequences should we reverse the judgment. A battle commander's poor judgment, an army surgeon's slip of hand, a

defective jeep which causes injury, all would ground tort actions against the United States.

The Court allowed recovery in the *Brooks* case because Brooks had been on furlough when the accident occurred, because his injury was not incident to his service, and because the question of military discipline was not involved. It denied recovery in *Feres* because such a recovery would be an invitation to the subversion of military discipline.

e. These factors, upon which the Feres decision is based, are not present in the instant claim.

In the case at bar, the respondent, Peter Brown, had been discharged from the Army Air Force in 1944. The injury at the hands of Veterans Administration employees, upon which this action is based, occurred in 1951, some seven years later. The respondent, of course, was not in the Armed Forces at the time of this injury. He was in no way subject to military discipline. In no sense would a recovery by him invite the problem of possible subversion of military discipline.

By the same token, comparable private liability exists in the instant case, whereas it did not exist in the *Feres* cases. Actions against hospitals based upon negligence have been sustained by New York courts even where the hospitals have been charitable institutions, *Sheehan* v. *North Country Community Hospital,* 273 N. Y. 163, 7 N. E. 2d 28, 109 A. L. R. 1197.

Similarly the "distinctively federal" relationship between the Government and members of the Armed Forces that exists where a soldier is injured while on active duty and not on furlough does not exist in the case at bar. The

instant question is one which may be decided "in accordance with the law of the place where the act or the omission occurred." 28 U. S. C. A. 1346(b).

Thus, the *Feres* case is not analogous to the case at bar. In the *Feres* case the Court was confronted with specific language in the Tort Claims Act indicating that the Act was not designed to cover claims by servicemen who were injured while on active duty and not on furlough. There is no such language in the Act barring the instant claim.

Furthermore, in the *Feres* case, allowance of the claims could very well have resulted in the dire consequences of subversion of military discipline. By no stretch of the imagination can such dire consequences result from the allowance of the instant claim.

2. *The Feres holding is not based on the alleged exclusiveness of the compensation remedy.*

a. What the Court said.

In its brief, Petitioner has misstated this Court's conclusion in *Feres* (pp. 14, 16, Brief of the United States).

By intermixing its own words with language of the Court taken out of context, Petitioner has given a false impression. The Court, in the *Feres* opinion, did *not* "answer this question in the affirmative," or "conclude" that compensation was the exclusive remedy.

There is no question that the Court referred to the exisence of the statutory system of remedies against the government. The mere reference to this statutory system does not indicate, however, that the Court's decision is based upon it. *All* that the Court says (that can possibly be construed as its holding) appears at page 139 of its opinion. The Court states:

> This Act, however, should be construed to fit, *so far as will comport with its words*, into the entire statutory system of remedies against the Government to make a workable, consistent, and equitable whole. (Italics supplied.)

Other references to the "comprehensive system of relief" such as those quoted by Petitioner, are either historical in nature or pure dicta.

As previously indicated, a recovery under the Tort Claims Act by a serviceman injured while on active duty, and while not on furlough, did not "comport with" the words of the statute. 28 U. S. C. No. 2674 provides that "The United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances * * * " 28 U. S. C. No. 1346(b) provides that "* * * the law of the place where the act or omission occurred" shall govern any consequent liability. These words, in the statute itself, led the Court to conclude that the Tort Claims Act did not cover an injury to a serviceman on active duty.

As we read the *Feres* opinion, the Court was simply saying that it was *desirable* to construe a given statute so as to make it workable, consistent, and equitable *vis-a-vis* other existing statutes. If it was possible to so construe a statute, without doing injustice to its words, then the Court would do it. That was all the Court implied.

In the *Feres* case, it was possible to so construe the Federal Tort Claims Act as applied to a claim arising from an injury to a serviceman on active duty and not on furlough. It was possible to do so in that case because the words of the statute itself appeared to specifically exclude such

claims. The Court did not rule, however, that the Veterans' Compensation Laws were exclusive.

The holding of the *Feres* case is stated in the last paragraph of the opinion, 340 U. S. 135, 146. It is significant that in this paragraph the existence of a compensation system is not even mentioned.

The statutory authority militating against a recovery in the *Feres* cases does not exist in the instant case, however. There are no words in the Federal Tort Claims Act to indicate that Congress did not intend the Act to cover claims such as the one at bar. As desirable as it may be to create a "workable, consistent, and equitable whole," this may be done only if the words of the statute permit.

b. The Court, in the Feres opinion, specifically reaffirmed the Brooks holding.

As previously indicated, this Court, in *Brooks* v. *United States*, 337 U. S. 49, 53, held that veterans' compensation was not an exclusive remedy, and that despite receipt of such compensation even a soldier could recover against the United States under the Tort Claims Act if the injury occurred while he was on furlough and not subject to military discipline. In the *Feres* opinion, which the Petitioner argues was based on the exclusiveness of the compensation remedy, the Court specifically reaffirmed the *Brooks* decision. The Court said, at page 146:

> It is contended that all these considerations were before the Court in the *Brooks* case and that allowance of recovery to Brooks requires a similar holding of liability here. The actual holding in the *Brooks* case can support liability here only by ignoring the vital distinction there stated. The injury to

> Brooks did not arise out of or in the course of military duty. Brooks was on furlough, driving along the highway, under compulsion of no orders or duty and on no military mission. A government owned and operated vehicle collided with him. Brooks' father, riding in the same car, recovered for his injuries and the Government did not further contest the judgment but contended that there could be no liability to the sons, solely because they were in the Army. This Court rejected the contention, primarily because Brooks' relationship while on leave was not analogous *to that of a soldier injured while performing duties under orders.* (Italics supplied.)

The *Brooks* case was unquestionably based on the non-exclusiveness of the compensation remedy, 337 U. S. 49, 53. Re affirmation of *Brooks* in the *Feres* opinion renders unsuccessful the Petitioner's argument herein that *Feres* was based on the exclusiveness of the compensation remedy. The language of the Court, quoted above, makes it clear that the *Feres* limitation on the applicability of the Tort Claims Act extends only to "a soldier injured while performing duties under orders."

c. The argument before the Court in the Feres cases is further indication that Feres was not based on the exclusiveness of the compensation remedy.

As stated above, *Feres* v. *United States*, 340 U. S. 135 decided three cases, *Feres* v. *United States*, *Jefferson* v. *United States*, and *United States* v. *Griggs, Executrix*. An examination of the briefs filed in all three of those cases before this Court fails to reveal any place where the United States made the argument that "the existence of a comprehensive and uniform Federal system of compensation benefits" precluded recovery under the Tort Claims Act.

The principal brief filed by the United States in the three *Feres* cases was that filed in the *Griggs* case (No. 31, Supreme Court, October Term, 1950). The Outline of Argument in the *Griggs* brief sets forth the points successfully relied upon by the Government in those cases. The Government argued first that *Brooks* v. *United States*, 337 U. S. 49 was authority for denying a recovery under the Tort Claims Act to those whose injuries were incident to service. Secondly, the Government argued that the Tort Claims Act was not intended by Congress to apply to claims by servicemen for injuries incident to their service; that allowing suits on service-caused injuries would lead to consequences which Congress should not be presumed to have intended; that it would subject the Government-soldier relationship to dissimilar state laws; and that it would subject service-caused injury and death claims to judicial scrutiny and thereby impair military discipline. Finally, the Government argued that neither the language nor the statutory scheme of the Federal Tort Claims Act will permit recovery thereunder of damages resulting from a service-incident injury negligently inflicted by one member upon another member of the Armed Services.

As shown by the *Feres* opinion, these arguments were adopted by the Court. The Government's present contention, that the *Feres* decision was based upon another argument (which was not even mentioned in the Government's briefs therein) thus lacks substantial merit.

d. Subsequent decisions have not changed or modified either the Brooks or Feres holding.

The Government argues, at page 16 of its brief that "subsequent decisions fortify the view that the *Feres* case was

based on the exclusiveness of the compensation remedy." With that argument we disagree.

Johansen v. *United States*, 343 U. S. 427, cited by the Petitioner at page 16 of its brief, is inapplicable. It involved a question of workmen's compensation as provided for under the Federal Employees Compensation Act of 1916 (5 U. S. C. A. 751, *et seq.*). The Court held that having collected workmen's compensation, a civilian employee on a public vessel could not sue the United States under the Public Vessels Act of 1925 (46 U. S. C. A. 781, *et seq.*), which allowed libels in admiralty. Thus, neither the Tort Claims Act nor the Veterans Compensation Statutes were involved.

This Court in the *Brooks* case, *supra*, recognized the distinction between workmen's compensation and veterans' compensation. The Court stated, 337 U. S. 49, 53:

> Provisions in other statutes for disability payments to servicemen, and gratuity payments to their survivors, 38 U. S. C. 701, indicate no purpose to forbid tort actions under the Tort Claims Act. Unlike the usual workmen's compensation statute, e.g. 33 U. S. C. 905, there is nothing in the Tort Claims Act or the Veterans' Laws which provides for exclusiveness of remedy.

Furthermore, in the *Johansen* opinion the Court, referring to *Feres*, spoke of it as relating to "soldiers on active duty" and "those in the Armed Services." *Johansen* v. *United States*, 343 U. S. 427, 440, 441. This was recognized by the Court of Appeals below, (R. 18, footnote 2). There is nothing in the *Johansen* opinion to indicate that *Feres* had direct application to anyone but servicemen on active duty.

Dalehite v. *United States*, 346 U. S. 15, cited by Petitioner at page 17 of its brief similarly is inapplicable to the case at bar. *Dalehite* was a test case arising from the explosion of ammonium nitrate fertilizer produced under specifications and control of the United States. The Court held (syllabus, p. 15) "As a matter of law, the facts found by the District Court can not give it jurisdiction under the Act because the claim is 'based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal Agency or an employee of the government', within the meaning of 28 U. S. C. Section 2680(a) which makes the Act inapplicable to such claims."

The language of the Court, in the *Dalehite* opinion, which the Petitioner has quoted at page 17 of its brief, has again been taken piecemeal and out of context by Petitioner. The language appears in a footnote (No. 25) at 346 U. S. 15, 31. The entire footnote reads as follows:

> In *Feres* v. *United States*, 340 U. S. 135, 71 S. Ct. 153, 95 L. Ed. 152, this Court held that the Act did not waive immunity for tort actions against the United States for injuries to *three members of the Armed Forces while on active duty.* The injuries were allegedly caused by negligence of employees of the United States. The existence of a uniform compensation system for injuries to those *belonging to the Armed Services* led us to conclude that Congress had not intended to depart from this system and allow recovery by a tort action *dependent on state law. Recovery was permitted by a serviceman for non-service disabilities in Brooks* v. *United States*, 337 U. S. 49, 69 S. Ct. 918, 93 L. Ed. 1200. (Italics supplied.)

Thus the reference by this Court to *Feres*, in the *Dalehite* opinion, was restricted to "those belonging to the Armed Services." The reaffirmation of the *Brooks* decision, wherein it was held that veterans' compensation was *not* an exclusive remedy, is further proof that this Court, in *Feres*, did not rule that it was the exclusive remedy.

United States v. *Gilman*, 347 U. S. 507, cited and quoted by the Petitioner at pages 24-26 of its brief is also inapplicable to the case at bar. In *Gilman* the United States had been held liable under the Federal Tort Claims Act for negligence of a governmental employee. This was an action to recover indemnity from the employee. This Court held that such an action could not be maintained. It pointed out that the problem of indemnity was one involving broad policy considerations; the discipline of government workers, loss of time from their work, etc. The Court said that this was a problem for Congress and not for the Courts to decide. In the absence of specific Congressional authorization, the Court would not allow indemnity.

The Government's claim, in *Gilman*, was made under general law. The respondents claim herein is made under the specific terms of the Federal Tort Claims Act. In *Gilman*, allowance of the Government's claim would have created great problems involving broad policy considerations. The whole relationship between the government and its employees might have been upset. Allowance of the respondent's claim herein involves no such problems.

Lewis v. *United States*, 190 Fed. 2d. 22, *certiorari* denied, 342 U. S. 869, cited by the Petitioner at page 18 of its brief, *United States* v. *Firth*, 207 F. 2d 665, cited at page 20 of the Petitioner's brief, *Mandel* v. *United States*, 191 F. 2d 164,

affirmed *sub nom. Johansen* v. *United States*, 343 U. S. 427, cited at page 20 of Petitioner's brief, *Sasse* v. *United States*, 201 F. 2d 871, 872, cited at page 21 of Petitioner's brief, and *Sigmon* v. *United States*, 110 F. Supp. 906, 911, cited at page 20 of Petitioner's brief are similarly inapplicable to the case at bar. None of them involve the Veterans' Laws and their allegedly exclusive character. Furthermore, *Lewis* v. *United States*, *supra*, as pointed out by the Court of Appeals below (R. 18) "related to an injury to a member of the U. S. Park Police incurred while on active duty." And, in *Sigmon* v. *United States*, (D. C. V. A. 1953) 110 F. Supp. 906, 909, the Court had said:

> In the case of *Feres* v. *United States*, it was held that the United States is not liable under the Tort Claims Act for injuries to members of the Armed Services sustained while on active duty and not on furlough and resulting from the negligence of others in the Armed Forces.

Archer v. *United States* (S. D. Cal.) 112 F. Supp. 651, cited by Petitioner at page 21 of its brief, supports more than it rejects the Respondent's position herein.

The Court stated, at page 651:

> I am of the view that plaintiff can not recover. The decedent, Herman Archer, a cadet at West Point Military Academy, was, at the time of his death, travelling in a military plane, under military discipline, and was under the laws and regulations in force at the time, on military duty. His death occurred 'in the course of military duty'.

O'Neil v. *United States* (C. A. D. C.) 202 F. 2d 366, and *Pettis* v. *United States* (N. D. Cal.) 108 F. Supp. 500, cited

by the Petitioner at page 19 of its brief, misread and misinterpreted the *Feres* decision, and failed to consider this Court's reasons for excluding from the Act claims of servicemen on active duty.

3. *The Feres decision is consistent with the Brooks decision.*

When this problem first came to the Court in *Brooks* v. *United States* (1949) 337 U. S. 49, the Court was aware of the entire problem and anticipated its later holding in the *Feres* case. The Court said, at 337 U. S. 49, 52:

> We are dealing with an accident which had nothing to do with the Brooks' army careers; injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented.

In *Feres* v. *United States*, 340 U. S. 135, 138, the Court clearly recalled its words in *Brooks*. The Court said:

> The common fact underlying the three cases is that each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the Armed Forces * * *. *This* is the 'wholly different case' reserved from our decision in *Brooks* v. *United States*, 337 U. S. 49, 52.

Thus, the Court, in the *Feres* decision, made it clear where the *Feres* holding began and the *Brooks* holding ended. The *Feres* limitation on the coverage of the Tort Claims Act exists where a claimant, "while on active duty and not on furlough" sustains an injury "due to negligence of others in the Armed Forces."

This relationship between the *Brooks* and *Feres* holdings was also anticipated by Judge Parker in his dissent below

in *United States* v. *Brooks*, (C.A. 4) 169 F. 2d 840, 850. Judge Parker, whose dissenting opinion was expressly approved by this Court (*Brooks* v. *United States*, 337 U. S. 49, 51), specifically referred to one of the *Feres* cases, then pending in a lower court, when he said:

> It should be noted that the claims in suit here do not arise out of injuries connected with the military service of plaintiffs, as was the case in *Jefferson* v. *United States*, D.C., 77 F. Supp. 706. Entirely different considerations might operate to deny recovery in such case, as is suggested in the opinion of Judge Chesnut. Since the act does no more than give the right to sue the government and adopts the law of the state in which the injury has occurred with respect to the establishing of liability, the question arises, as to an injury caused by army service, whether under the law of the state there is any liability for such an injury. No such question is presented here; and the only ground upon which it could be answered in the negative does not exist with respect to an injury which has no connection with army service. In that case, liability would be held not to exist because of lack of basis in state law. Here, the only way in which liability can be avoided is to read into the statute an exception to language which admittedly covers the case, an exception which Congress evidently considered and decided not to incorporate in the act.

Respondent's claim herein contains none of the factors basic to the *Feres* limitation on the *Brooks* holding. He has a valid claim, under the *Brooks* decision. As a discharged veteran, Peter Brown was freer of military discipline than was the soldier, on furlough, in *Brooks* v. *United States*, *supra*.

4. Subsequent decisions have interpreted Feres as being limited to servicemen on active duty.

In *O'Brien* v. *United States* (C. A. 8, 1951), 192 F. 2d 948, 950, the Court said:

> In the *Feres* case * * * the plaintiffs were in Military Service on active duty and sought to maintain actions under the Tort Claims Act for injuries resulting from alleged negligent acts of representatives of the Government in the performance of their duties as such representatives. The Court held that, 'The Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.' The controlling importance of the Trial Court's finding that deceased was acting in the line of duty at the time of his fatal injury is obvious.

Similarly, in the instant case, the Court of Appeals for the Second Circuit unanimously supported respondent's position, saying (R. 18):

> We think that these facts do not bring their case within the doctrine of *Feres* v. *United States*, since no injury of which plaintiff now complains was sustained while he 'was on active duty and not on furlough'.

In *Snyder* v. *United States* (D.C. Md. 1953) 118 F. Supp. 585, 595-600, the plaintiff was an army sergeant who was off duty, on pass, when an abandoned army bomber crashed into a house in which he was present. He brought an action against the government under the Federal Tort Claims Act. The Court ruled in his favor, on the basis of *Brooks* v. *United States, supra*. The Court compared and analyzed

the *Brooks* and *Feres* decisions. It held that *Feres* was based on the fact that the claimants therein were "on active duty and not on furlough".

D. The Santana and Bandy decisions support respondent's position herein.

Santana v. *United States* (C. A. 1, 1949), 175 Fed. 2d 320, was decided by the First Circuit Court of Appeals after the *Brooks* decision, and before the *Feres* decision. This also was an action under the Federal Tort Claims Act. The plaintiffs were the heirs of Manuel Rey, a veteran who obtained admission to a Veterans Administration hospital subsequent to his discharge. The complaint alleged that he died as the result of the negligence of the employees of the hospital in caring for him. The United States argued that there was a comprehensive system of special statutory benefits for service-connected injuries; that Congress in enacting the Tort Claims Act must have intended to exclude such claims from it; that despite the general language of the act and the fact that the act itself contains twelve specific exceptions, none of which excludes an ex-serviceman from its benefits, it should be read as impliedly excluding such claims.

The District Court dismissed the complaint, but the Court of Appeals reversed. The Court of Appeals said, at page 322:

> In our opinion, the decision in the *Brooks* case has completely undermined the arguments of the Government in the case at bar * * *
>
> In the case at bar Manuel Rey was not in the service at the time of the negligence complained of. He had returned to private life as a discharged veteran

> and inclusion of his claim within the coverage of the Tort Claims Act would involve no problem of the 'subversion of military discipline'.
>
> With respect to the remaining argument that Congress presumably did not intend to include discharged veterans within the coverage of the Tort Claims Act insofar as they already are covered by a 'comprehensive system of special statutory benefits,' the Supreme Court in its decision in the *Brooks* case, in the language above quoted expressly discredited that argument even as applied to servicemen.

Similarly, *Bandy* v. *United States* (D. C. Nevada 1950), 92 Fed. Sup. 360, is directly in point and upholds the plaintiff's position in the case at bar. The plaintiff therein was a veteran who had been discharged with a rheumatic fever disability, incurred while in service. He subsequently entered a Veterans Administration Hospital to receive examination and treatment, if necessary, of the rheumatic disability. In the course of receiving heat treatments, he was placed in an electric cabinet bath. Despite his complaint, he was kept there too long. He became unconscious and suffered serious burns.

On his action brought under the Tort Claims Act, the Court rejected the government's arguments that the plaintiff had made an election of remedies by obtaining compensation under the Veteran's Compensation Act, and that his disability (the resulting scars) was a service-connected disability, for which he could not recover under the Tort Claims Act. The Court awarded $15,000 to the plaintiff.

The Government argues, at pages 23 and 24 of its brief, that these cases are entitled to no weight because both of

them were decided before this Court's decisions in *Feres* and *Johansen.*

As the Court of Appeals, below, pointed out (R. 18) this argument is untenable. *Feres* v. *United States,* the Court says is "Not in point," inasmuch as it involved claimants who were on active duty and not on furlough. *Johansen* v. *United States* was considered by the Court below 'inapposite since it involved an interpretation of quite different statutes," and since the Court therein, "referring to the Feres case," spoke of it (343 U. S. at 440) as relating to "soldiers on active duty."

II. Brown's Injury Is Not "Incident to Service" in the Sense Intended by the Court in the Brooks and Feres Decisions. He Suffered a New and Different Injury at the Veterans Administration Hospital.

The injury for which respondent now seeks compensation under the Tort Claims Act is a different and distinct injury from the one he suffered while on active duty in New Guinea. Respondent originally suffered a recurrent dislocation of the patella (R. 5). This action seeks damages for the injury to the nerves in respondent's leg and the resulting paralysis, which was caused by the defective tourniquet and the negligence of an operating-room attendant in the employ of the Veterans Administration (R. 1, 2).

To borrow the words of this Court, there is no connection between this latter injury and the respondent's military service, "except in the sense that all human events depend upon what has already transpired." *Brooks* v. *United States,* 337 U. S. 49, 52.

The Court of Appeals, below, rejected the Government's argument, stating (R. 18):

> Moreover, we do not agree with the government's contention that plaintiff's claim is to be deemed merely an aggravation of his original injury and that it is therefore to be regarded just as if it had happened while he was on active duty.

The Petitioner argues, however, at pages 41-47 of its brief that, even if the compensation remedy is not exclusive the respondent's injury was "incident to his service," and thus respondent's claim falls within the *Feres* limitation to the applicability of the Act.

The meaning of the phrase, "incident to service" is not to be found in cases involving workmen's compensation, or in administrative decisions of the Veterans Administration, as Petitioner suggests. The meaning and intent of these words is found in this Court's opinions in the *Brooks* and *Feres* cases, where the phrase was used.

As previously indicated, this Court had said, in *Brooks* v. *United States*, 337 U. S. 49, 52, "Were the accident *incident* to the Brooks' *service*, a wholly different case would be presented." In *Feres* v. *United States*, 340 U. S. 135, 138, the Court said, "The common fact underlying the three cases is that each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the Armed Forces * * * ". Then, in the same paragraph and almost immediately following this sentence, the Court said, "*This* is the 'wholly different case' reserved from our decision in *Brooks* v. *United States*, 337 U. S. 49, 52, 69 S. Ct. 918, 920, 93 L. Ed. 1200." (Italics supplied.)

Thus, it is clear that an accident "incident to service" is one which occurred while the claimant was on active duty and not on furlough, and when the injury was due to negligence of others in the Armed Forces. The reiteration by the Court, in the *Feres* case of the words, "a soldier," "those disabled in service," "injuries to servicemen," "military personnel," "service-connected injuries," "superior officers," and, "active duty" make it clear that "incident to service" means just what it says. *Feres* v. *United States*, 340 U. S. 135, 137, 138, 139, 140, 141, 143, 145, 146.

Administrative determination, whether by the Veterans Administration or by a Workmen's Compensation Board that a subsequent, hospital-caused injury is compensible under either Workmen's Compensation Statutes or Veterans Administration practice, is irrelevant to the question of what this Court meant in the *Brooks* and *Feres* decisions.

Both Workmen's Compensation and Veterans' Compensation constitute social legislation designed to protect workers and veterans. Such determinations as those cited by Petitioner at pp. 44-47 of its brief tend to effectuate the purpose of that legislation. They broaden and make secure the rights of injured persons. In this case, however, the only effect of ruling that Peter Brown's injury was "incident to his service" would be to deprive him of a remedy. It would not, in any way, effectuate a legislative purpose.

"Incident to service" as used by this Court signifies something arising out of the unique situation of military duty—military duty which is federal in character, which defies comparison to private liability, and which necessarily implies the existence of military discipline.

Furthermore, denial of Brown's claim on the ground that his injury "arose out of activity incident to his service" would render the logic of this Court, in *Brooks* and *Feres* meaningless. As the law exists now, the general language and the lack of a specific exception in the Tort Claims Act govern, *Brooks* v. *United States, supra.* If, however, the claimant was on active duty and not on furlough when his accident occurred, then, still consistent with the words of the Tort Claims Act, he may not recover, *Feres* v. *United States, supra.*

Unless the *Feres* limitation is restricted to servicemen on active duty, the law will be hopelessly confused. Assume, for example, that Brown was being treated in a Veterans Administration hospital for poison ivy contracted seven years after his discharge, when he was negligently injured. That, under the Government's logic, would not have arisen out of an activity "incident to his service" and he might recover under the Act. There is no valid reason for distinguishing between the two claims. The Government has not pointed, nor can it point, to any language in the Tort Claims Act supporting such a distinction.

Or, to take another example, assume that Brown had been hit by a Government mail truck while on Veterans' Administration Hospital grounds. Is the fact that he was there for treatment of a service-connected injury to make the difference? There is no logic to such a conclusion. The law, as it exists now under *Brooks* and *Feres*, is clear. The respondent, Peter Brown, has a remedy under the Tort Claims Act.

Conclusion

For the reason stated, it is respectfully submitted that the judgment below should be affirmed.

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